

Redesigning the South African Unemployment Protection System: A Socio-Legal Inquiry

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University of Johannesburg*

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By

*Letlhokwa George Mpedi
920008454*

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Supervisor: Prof. Dr. Marius Paul Olivier

DECLARATION

I, the undersigned, hereby declare that the work contained in this thesis is my own original work which has not been submitted before in whole or in part for any degree at any other university.

.....
Letlhokwa George Mpedi

June 2006

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DEDICATION

This dissertation is dedicated to my mother, Hambile Josephine Mpedi.

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ABBREVIATIONS

AIDS	Acquired Immune Deficiency Syndrome
AIR	All India Reporter
ANC	African National Congress
BCLR	Butterworths Constitutional Law Report
BCEA	<i>Basic Conditions of Employment Act</i>
BGBI.	<i>Bundesgesetzblatt</i> (Federal Law Gazette)
BIG	Basic Income Grant
CBPWP	Community Based Public Works Programme
CC	Constitutional Court (South Africa)
CIDB	Construction Industry Development Board
CIDBA	<i>Construction Industry Development Board Act</i>
CIDP	Construction Industry Development Programme
CIMP	Consolidated Municipal Infrastructure Programme
COSATU	Congress of South African Trade Unions
DPRU	Development Policy Research Unit
ECD	Early Childhood Development
<i>ed</i>	edition
ed(s)	editor(s)
e.g.	<i>exempli gratia</i> [for instance]
<i>etc</i>	<i>et cetera</i>
EEA	<i>Employment Equity Act</i>
EPWP	Expanded Public Works Programme
<i>et al</i>	<i>et aliis</i> [and others]
FES	Friederich Ebert Stiftung
fn	footnote
IDASA	Institute for Democracy in South Africa
IFPRI	International Food Policy Research Institute
ILJ	Industrial Law Journal (South Africa)
ILO	International Labour Office

<i>i.e.</i>	<i>id est</i> [that is]
HCBC	Home Community Based Care
HIV	Human Immune Deficiency Virus
KZN	Kwa-Zulu Natal
LAC	Labour Appeal Court
Lab I.C	Labour and Industrial Cases
Lab L.J	Labour Law Journal
LAWSA	Law of South Africa
LRA	<i>Labour Relations Act</i>
NALEDI	National Labour and Economic Development Institute
NBER	National Bureau of Economic Research
NEDLAC	National Economic Development and Labour Council
NGO	Non-Governmental Organisation
RDP	Reconstruction and Development Programme
S.	<i>Seite</i> (page)
s	section
SADC	Southern African Development Community
SANGOCO	South African NGO Coalition
SARS	South African Revenue Services
SC	Supreme Court of India
SCC	Supreme Court Cases
SDA	<i>Skills Development Act</i>
SETA	Sector Education and Training Authorities
SEWA	Self-Employed Women's Association (India)
SEWU	Self-Employed Women's Union (South Africa)
SMME	Small, Medium and Micro Enterprises
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UIA	<i>Unemployment Insurance Act</i>
UICA	<i>Unemployment Insurance Contributors Act</i>
UIF	Unemployment Insurance Fund
UNICEF	United Nations Children's Fund

v / *vs.*

Versus

WWP

Working for Water Programme

ZEW

Zentrum für Europäische Wirtschaftsforschung

SUMMARY

The South African unemployment protection system provides protection against unemployment through an unemployment insurance scheme. While there are other measures (such as tax-funded social assistance benefits and public works programmes as well as informal coping strategies) which play a role in cushioning the negative impact of unemployment, the South African unemployment protection system does not provide for unemployment assistance benefits. Means-tested social assistance benefits are limited to certain categories of persons and are not directly targeted at the unemployed. In practice these social assistance grants, through informal transfers, filter through to benefit unemployed persons in the household context. Notwithstanding the poverty alleviation role of unemployment insurance benefits and that of informal transfers, a majority of the unemployed are left at the mercy of poverty. This could be attributed to, among others, the fact that the South African unemployment protection system is based on an assumption that unemployment is transient (which is not the case anymore); pays out low benefits; does not provide protection to those who exhausted their unemployment insurance benefits; contains limited measures aimed at the (re)integration of unemployed persons into the labour market; and excludes many groups and categories of persons from its scope of coverage (for example, it pays little or no attention to youth unemployment and the plight of those who are employed in the informal economy). Consequently, the thesis critically analyses the South African unemployment protection system so as to identify the existing deficiencies, and develops a range of valuable proposals on how to reconstruct the system. It, therefore, follows that this thesis does not only contribute to existing scientific debate and legal discourse in the field of unemployment protection. Apart from the legislative proposals, a major contribution is also made in the form of policy options to improve and redesign the South African unemployment protection system.

Keywords: Employment protection; income security; social security; unemployment assistance; unemployment insurance; and unemployment protection.

CHAPTER 1

GENERAL BACKGROUND

1. INTRODUCTION: (UN)EMPLOYMENT TRENDS IN SOUTH AFRICA¹

1.1. Employment

The September 2005 statistics estimate the total number of employed persons² in South Africa to be hovering at 12 301 000.³ That is an increase of 658 000 when one compares the September 2005 statistics with the September 2004 estimate of 11 643 000.⁴ A breakdown of employment figures per sector (i.e. the formal sector and the informal sector⁵) for September 2001 to September 2005 is as follows:

¹ Although this study is in favour of the expanded definition of unemployment (see paragraph 1.2. in chapter 1), it should be noted that the Labour Force Survey (Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2005)) statistics contained in this study are largely based on the official definition of unemployment (i.e. the narrow definition of unemployment) (see paragraph 1.2. in chapter 1).

² Statistics South Africa (Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2005)) xxiv) defines 'the employed' as "those who performed work for pay, profit or family gain in the seven days prior to the survey interview, or who were absent from work during these seven days, but did have some form of work to which to return."

³ Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2005)) ii.

⁴ *Ibid* iv.

⁵ Statistics South Africa distinguishes between the 'formal sector' and the 'informal sector' as follows: the 'formal sector' "includes all businesses that are registered in any way" (Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2005)) xxiv). The 'informal sector', on the other hand, "consists of those businesses that are not registered in any way" Statistics South Africa provides further that: "[These businesses] are generally small in nature, and are seldom run from business premises. Instead they are run from homes, street pavements or other informal arrangements" (Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2005)) xxiv). In this study, the concept 'informal sector' is used interchangeably with 'informal economy'.

EMPLOYMENT IN THE FORMAL AND INFORMAL SECTOR, SEPTEMBER 2001 TO SEPTEMBER 2005

Sector	Sep'01	Sep'02	Sep'03	Sep'04	Sep'05
	Thousand				
Formal sector (excluding agriculture)	7 027	7 181	7 373	7 692	7 987
Informal sector (excluding agriculture)	1 967	1 780	1 903	1 946	2 462
Domestic workers	881	844	895	881	859
Agriculture*	1 178	1 420	1 212	1 063	925
Unspecified	128	72	40	60	67
Total employment	11 181	11 296	11 424	11 643	12 301
	Percentage				
Formal sector (excluding agriculture)	63,6	64	64,8	66,4	64,9
Informal sector (excluding agriculture)	17,8	15,9	16,7	16,8	20,0
Domestic workers	8,0	7,5	7,9	7,6	7,0
Agriculture	10,7	12,6	10,7	9,2	7,5
Total	100,0	100,0	100,0	100,0	100,0

* Agriculture is excluded because of the extreme season variation of the industry.

Source: Statistics South Africa⁶

1.2. Unemployment

South Africa, just like many developing countries, is facing a grave unemployment problem. The unemployment rate (based on the official definition of unemployment),⁷ as indicated in a table (**Key labour market indicators, March 2004 to September 2005 (official definition of unemployment)**), was virtually unchanged in September 2005 (26,7%) as compared with 26,2% in September 2004.⁸

⁶ Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2005)) ix.

⁷ Statistics South Africa explains the meaning of the official definition of the 'unemployed' as follows: "The unemployed are those people within the *economically active population* who: (a) did not work during the seven days prior to the interview, (b) want to work and are available to start work within two weeks of the interview, and (c) have taken active steps to look for work or to start some form of self-employment in the four weeks prior to the interview" (italics in the original) (Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2005)) xxiv). The 'expanded definition', on the other hand, excludes criterion (c) (Statistics South Africa *Labour Force Survey: March 2005* (Statistics South Africa (2005)) xxi). It should be recalled that the expanded definition of the unemployed includes the discouraged work-seekers. The 'discouraged work-seekers' are, according to Statistics South Africa (Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2005)) xxiv), those persons who "did not take active steps to find employment in the month prior to the survey interview". The total number of discouraged work-seekers was hovering at 3 312 000 in September 2005 (Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2005)) xvi). The 'economically active population', according to Statistics South Africa (Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2005)) xxiv), "consists of both those [persons] who are employed and those who are unemployed."

⁸ Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2005)) iv.

KEY LABOUR MARKET INDICATORS, MARCH 2004 TO SEPTEMBER 2005
(OFFICIAL DEFINITION OF UNEMPLOYMENT)

Labour market category		Mar 2004	Sep 2004	Mar 2005	Sep 2005
		Thousand	Thousand	Thousand	Thousand
a	Employed	11 392	11 643	11 907	12 301
b	Unemployed (official definition)	4 415	4 135	4 283	4 487
c	Labour force = a + b	15 807	15 778	16 190	16 788
d	Not economically active	13 324	13 527	13 334	12 909
e	Total aged 15–65 years = c + d	29 131	29 305	29 524	29 697
		%	%	%	%
f	Unemployment rate = $b / c \times 100$	27,9	26,2	26,5	26,7

Source: Statistics South Africa⁹

The unemployment (based on the official definition) problem in South Africa is not evenly spread between provinces, population groups, gender and age. As shown in a table (**Official unemployment rate by province, September 2001 to September 2005**) below, in September 2001 and September 2005 provinces such as KwaZulu-Natal, Eastern Cape, Free State and Limpopo had higher unemployment rates than elsewhere while the Western Cape had the lowest unemployment rate over the same period. These disparities between provinces can be traced back to the old South Africa. Poor performing provinces, such as the Eastern Cape and Limpopo, inherited most parts of the former homelands or Bantustans.¹⁰ The drawback of this inheritance is that homelands were characterised by deep-rooted social and economic problems which could not just be wished away. These problems include poverty

⁹ Statistics South Africa *Labour Force Survey: March 2005* (Statistics South Africa (2005)) iii and Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2005)) ii.

¹⁰ WordIQ (<http://www.wordiq.com/definition/Bantustan.html>) describes Bantustans as follows: “Bantustan or Bantustans is the name that was given to the tribal homelands of South African native black Africans by the white Apartheid rulers of the Republic of South Africa that were designated to become independent states under a grand plan called ‘separate development’ which would have granted independence to blacks in these newly created tribal states. Bantu means ‘people’ in the Bantu languages spoken in Southern Africa. There were to be about ten Bantustan-Homelands [Bophuthatswana, Ciskei, Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa, QwaQwa, and Transkei]. These small, quasi-sovereign nations were established under the 1951 Bantu Authorities Act.”

and inequality, unemployment, poorly developed welfare services and infrastructure, authoritarian regimes and prevalence of male migrant labour.¹¹

**OFFICIAL UNEMPLOYMENT RATE BY PROVINCE, SEPTEMBER 2001 TO
SEPTEMBER 2005**

Province	Sep'01	Sep'02	Sep'03	Sep'04	Sep'05
	Percentage				
Western Cape	17,7	19,6	19,5	18,6	18,9
Eastern Cape	31,4	32,7	31,7	29,6	29,9
Northern Cape	25,0	24,9	26,4	24,5	24,7
Free State	27,0	29,1	28,0	28,6	30,2
KwaZulu-Natal	33,8	35,0	31,6	28,7	32,8
North West	28,6	30,6	28,4	28,0	27,4
Gauteng	30,4	30,5	27,6	25,7	22,8
Mpumalanga	29,2	30,1	25,3	24,8	26,9
Limpopo	34,6	34,1	31,1	27,8	30,1
RSA Average	29,4	30,4	28,0	26,2	26,7

Source: Statistics South Africa¹²

Unemployment rate by population group and sex (based on the official definition), as shown in a table (**Unemployment rate by population group and sex, September 2001 to September 2005**) below, indicates that Africans had the highest unemployment rate in South Africa over the period September 2001 to September 2005 when compared with other population groups. In addition, the female unemployment rate in South Africa was higher than the male unemployment rate over the same period.

¹¹ See, for an interesting description of the nature and extent of the socio-economic circumstances which characterised the former homelands, Lahiff *E Land, Water and Local Government in South Africa: A Case of the Mutale River Valley* (IDPM Rural Resources/Rural Livelihoods Working Paper No. 7 (1997)) – accessed at http://idpm.man.ac.uk/publications/wp/rr/rr_wp07.shtml.

¹² Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2005)) xiv.

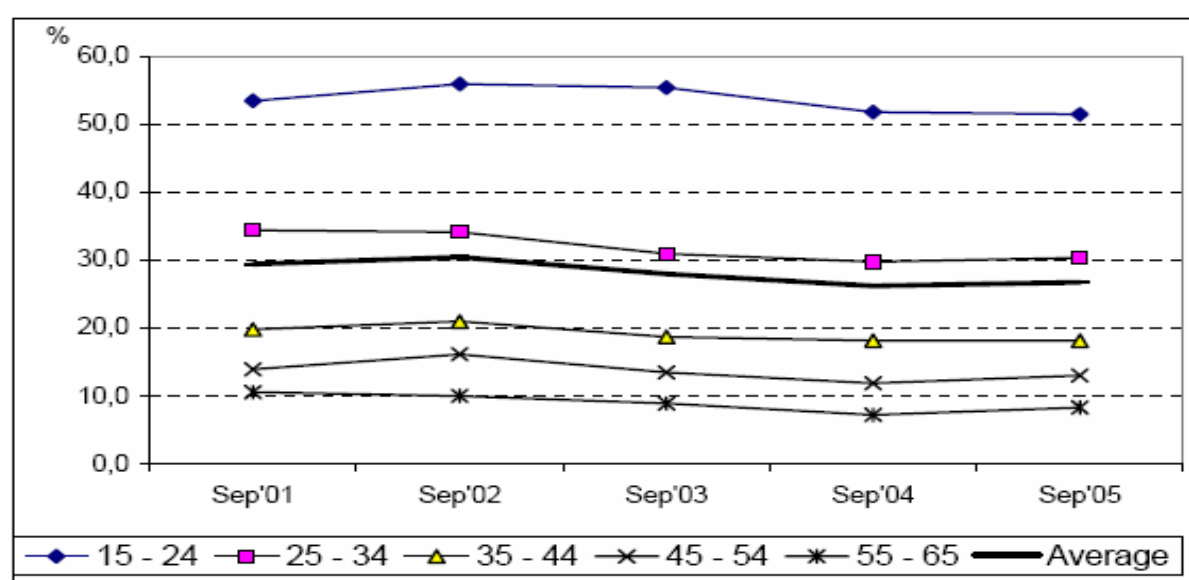
UNEMPLOYMENT RATE BY POPULATION GROUP AND SEX, SEPTEMBER
2001 TO SEPTEMBER 2005

	Sep'01	Sep'02	Sep'03	Sep'04	Sep'05
	Percentage				
Male					
Black African	31,5	31,5	30,0	27,6	26,6
Coloured	19,5	19,9	18,8	19,7	20,6
Indian/Asian	15,7	15,6	15,5	12,4	14
White	4,7	5,0	4,0	5,1	3,6
Average	25,8	25,9	24,7	23,1	22,6
Female					
Black African	40,7	42,3	38,7	36,0	37,1
Coloured	23,1	26,6	23,6	24,1	24,6
Indian/Asian	23,5	27,1	18,4	15,4	18,6
White	7,4	7,4	6,2	5,8	6,9
Average	33,8	35,9	32,0	30,2	31,7

Source: Statistics South Africa¹³

The official unemployment rate by age, as reflected in **Figure 1 (Unemployment rate by age, September 2001 to September 2005)** below, reveals that the official unemployment rate is still high among the youth.¹⁴

UNEMPLOYMENT RATE BY AGE, SEPTEMBER 2001 TO SEPTEMBER 2005



Source: Statistics South Africa¹⁵

¹³ *Ibid* xv.

¹⁴ The term 'youth', in line with the standard ILO definition, "comprises the age-group between fifteen and twenty-four inclusive." O'Higgins N *The Challenge of Youth Unemployment* (ILO (1997)) 1.

The preceding statistics, apart from revealing the immense unemployment challenge faced by South Africa, indicate the areas (at provincial level, in terms of population group, gender and age), that require more emphasis on unemployment eradication endeavours.

2. AIM OF STUDY

The aim of the study is to critically analyse the South African unemployment protection system so as to identify the existing deficiencies and to develop proposals on how to reconstruct the system, with particular emphasis on legal hindrances, challenges and implications. This will be achieved by examining from a South African context specific countries (one developed country (i.e. Germany) and one developing country (i.e. India)), innovative approaches adopted by certain regions of the world (particularly the Council of Europe and the European Union) and standards set by international organisations (particularly the International Labour Organisation (ILO)) in the area of unemployment protection.

3. INTRODUCTION TO THE PROBLEM TO BE STUDIED

The South African unemployment protection system is largely built on an unemployment insurance approach.¹⁶ While it should be acknowledged that there are other measures (mainly state-funded and informal measures) which play a role in cushioning the effects of unemployment, the South African unemployment protection system does not provide for unemployment assistance benefits. Means-tested social assistance benefits are limited to certain categories of persons who are young, old or disabled enough not to work.¹⁷ This state of affairs has sparked many interest groups, more especially the Congress of South African

¹⁵ Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2005)) xvi.

¹⁶ The South African unemployment insurance system is, generally, regulated by means of two statutes, namely the *Unemployment Insurance Act* (UIA) 63 of 2001 and the *Unemployment Insurance Contributions Act* (UICA) 4 of 2002. The UIA largely provides for the payment of unemployment benefits. The UICA, on the other hand, makes provision for the collection of benefits. The South African Revenue Services (SARS) registered employers are required to pay contributions to the SARS Commissioner (see s 8 of the UICA and South African Revenue Services *Unemployment Insurance Contributions: Guideline to Employers* (South African Revenue Services (2002)) – accessed at http://www.sars.gov.za/uif/guidelines/uif_brochure.pdf). The UIA, on the other, regulates the collection of contributions from employers other than those who are registered with the SARS. Contributions from employers who are not required to register with the SARS or have not voluntarily done so or are not liable to pay the prescribed skills development levy must be paid to the UIF Commissioner (see s 9(1) of the UICA). Unemployment insurance in South Africa is financed through a proportional employer (1% of the remuneration) and employee (1% of the remuneration) contributions. See, for an illuminating description of unemployment insurance in South Africa, Olivier MP and Van Kerken E “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415.

¹⁷ See paragraph 1.2.2.2. (a) in chapter 3.

Trade Unions (COSATU), to lobby for the introduction of a basic income support grant for the indigent masses of South Africa.¹⁸ In addition to the foregoing, the South African unemployment protection system is confronted by, among others, the following issues and challenges:

(a) Burgeoning unemployment

The official unemployment rate of 26,7%¹⁹ is unacceptably high. This points one to the fact that the South African unemployment system is desperately and urgently in need of a major reform. The urgency that this reform should be treated with, stems from an acknowledged fact that unemployment comes with a heavy price tag for employees and their employers, unemployed persons and their communities, and (most importantly) the state. Unemployment results in, *inter alia*: loss of output that unemployed workers could have produced; loss of freedom and social exclusion; poor health (both physical and psychological) and mortality; discouragement for future work; and the lack of organisational flexibility and technical conversion.²⁰

It is indeed correct to assert that: "...while employment is the result of an interplay of economic forces, it is also an inherently social phenomenon, fulfilling four basic functions: it provides income, social protection, and material well-being for the individual; it enables one to participate in and develop a sense of belonging to a social fabric; it develops one's personal skills and capabilities; and it allows one to contribute

¹⁸ See, for example, Naidoo R "The Basic Income Grant: Poverty, politics and policy-making" Paper presented at the Harold Wolpe Lecture Series, University of Natal, 31 October 2002, Samson M *et al Research Review on Social Security Reform and the Basic Income Grant for South Africa* (Economic Policy Research Institute (2002)) – accessed at <http://www.epri.org.za/rp31.pdf>, Van der Berg S "The Basic Income Grant: Comments on the Report of the Committee of Inquiry into a Comprehensive Social Security System" – accessed at http://www.safoundation.org.za/documents/THE_BASIC_INCOME_GRANT.doc, McDonald S "The impact of the proposed Basic Income Grant on the Western Cape" A paper prepared for the 6th Annual Conference on Global Economic Analysis, The Hague, Netherlands, 12-14 June 2003, Matisson HM and Seeking J "Welfare in wonderland?: The politics of the Basic Income Grant in South Africa" Paper prepared for the Political Studies Seminar, University of Cape Town, 27 August 2002, Thurlow J *Can South Africa Afford to Become Africa's First Welfare State?* (International Food Policy Research Institute (2002)) and Bhorat H "Is a universal income grant the answer?" (2002) 26 *SA Labour Bulletin* 19.

¹⁹ Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2005)) ii.

²⁰ See, *inter alia*, Kingdon GG and Knight J "Unemployment in South Africa: The nature of the beast" (2004) 32 *World Development* 391, Sen A "Inequality, unemployment and contemporary Europe" (1997) 136 *International Labour Review* 155, Hamilton VL "Hard times and vulnerable people: Initial effects of plant closing on automaker's mental health" (1990) 31 *Journal of Health and Social Behaviour* 123, Shamir B "Self-esteem and the psychological impact of unemployment" (1986) 49 *Social Psychology Quarterly* 61 and Stern J "The relationship between unemployment and mortality in Britain" (1983) 37 *Population Studies* 61.

something meaningful to the national economy.”²¹ The brunt of unemployment is also felt by the dependants of the unemployed persons. As the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (the Committee) states: “The loss of a job, or the inability to find one, has a devastating impact on individuals and their dependants. This goes beyond the loss of income and what it can buy, to questions of social participation and personal identity.”²² The foregoing consequences of unemployment reaffirm the importance of combating unemployment. Furthermore, they highlight the need for accommodating preventative and (re)integrative measures in both policy and legal measures aimed at addressing unemployment in South Africa.

(b) Limited scope of coverage

The South African unemployment insurance system, which caters only for short-term unemployment, does not extend coverage to groups such as civil servants, persons who participate in learnership agreements (e.g. contracts of apprenticeship), the unemployed youth and certain categories of foreign nationals.²³ In addition, it excludes all those persons who fall outside the definition of ‘employee’²⁴ as contained in the UIA and the UICA.²⁵ The exclusion of certain groups of persons from the scope of coverage of the unemployment protection system might have constitutional implications. South Africa’s categorical and means-tested social assistance system has a limited scope of coverage.²⁶ In addition, it does not make provision for unemployment assistance. The lack of unemployment assistance for the needy unemployed person can potentially be challenged on the basis of section 27 of the

²¹ Lönnroth J “Global employment issues in the year 2000” (September 1994) *Monthly Labor Review* 5 at 5.

²² Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa* (Committee of Inquiry into a Comprehensive System of Social Security for South Africa (March 2002)) 17.

²³ See paragraph 2.2.2. in chapter 3.

²⁴ Section 1 of *Unemployment Insurance Act* (UIA) and s 1 of *Unemployment Insurance Contributors Act* (UICA) define ‘employee’ as “...any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor.” The impact of this exclusion is that the self-employed, the informally employed, (in)dependent contractors and many other categories of the atypically employed are marginalised as regards the Unemployment Insurance Fund coverage.

²⁵ See, for further reading, Olivier MP and Van Kerken E “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415.

²⁶ In South Africa, for a person to benefit from the social assistance system, he or she must be either young enough (see s 5 of the *Social Assistance Act* 13 of 2004) or old enough (see s 10 of the *Social Assistance Act*) or disabled enough (see s 9 of the *Social Assistance Act*). In addition, he or she must also comply with the relevant means test (see s 5(2)(a) and (b) of the *Social Assistance Act*). Consequently there are, generally speaking, a large number of needy individuals who are excluded and marginalised from the social assistance system.

Constitution.²⁷ In terms of section 27(1)(c) “everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.” Section 27(2) of the Constitution obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right of access to social security. The conclusion to be made, therefore, is that section 27(1)(c) places the lack of a proper unemployment assistance system under considerable constitutional strain.²⁸

(c) Limited measures to combat unemployment

Measures to promote employment, prevent job losses and (once job losses are inevitable) (re)integrate those who lost their jobs into the labour market are limited in the South African unemployment system.²⁹ Unemployment insurance legislation (*Unemployment Insurance Act* (UIA) 63 of 2001 and *Unemployment Insurance Contributions Act* (UICA) 4 of 2002), as found in South Africa, does not, as pointed out by Olivier, “pay serious attention to or treat the prevention of unemployment as part of the wider aim of unemployment insurance.”³⁰

(d) Rising informal economy

When the formal economy sheds the labour force in droves, a substantial number of the labour force seek solace from the informal economy.³¹ South Africa, as one of the developing countries, serves as a perfect example. A majority of the unemployed South African populace who are discarded by the formal economy often resort to the

²⁷ Act 108 of 1996. See paragraph 1 in chapter 3.

²⁸ See paragraph 1.2.2. in chapter 3.

²⁹ See, for example, paragraphs 2.2.1., 2.3.1. and 2.3.4. in chapter 3.

³⁰ Olivier MP “Towards a coherent approach to social protection, labour market policies and financing of social security: A new paradigm for South Africa” (2000) 24 *South African Journal of Labour Relations* 23 at 31. Also see Olivier MP and Van Kerken E “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415.

³¹ This is problematic for the reason that: “Workers in the informal economy are not recognised, registered, regulated or protected under labour legislation and social protection, often because their employment status is ambiguous. They are generally not able to exercise or defend their fundamental rights. Facing great difficulties in organizing themselves, they have little or no collective representation vis-à-vis employers or public authorities. Although most at risk and therefore most in need, workers in the informal economy have little or no social protection, either from an employer or from the government. Workers in the informal economy are often excluded from education, skills building, training, health care and childcare, which are particularly important for women workers” (ILO *Working Out of Poverty* (ILO (2003)) 29-30).

informal economy.³² It is, indeed, a matter of survival – particularly when one considers other contributing factors which are widespread in South Africa, such as burgeoning unemployment,³³ rising poverty and inequality,³⁴ and the limited scope of social security coverage.³⁵

4. FURTHER DETAILS OF THE PROBLEM TO BE STUDIED

4.1. Significance of the study

The significance of the study is that the most salient deficiencies found in the South African unemployment protection system will be highlighted and measures, which will include legislative proposals, to remedy those deficiencies will be proposed. At the same time, remedies are proposed aimed at improving the South African unemployment protection system that is presently in need of comprehensive overhaul. It, therefore, follows that this study will not only contribute to existing academic debates in the field of unemployment protection. Apart from the legislative proposals, a major contribution will also be made in the form of policy options for the South African unemployment protection system and policymakers alike. This is so because, on many occasions, the South African social insurance and social assistance legislation, academics and policymakers fall into a trap of viewing the South African unemployment protection system from what one can call a narrow-minded point of view. That is, they fail to recognise protection from unemployment as something that stretches beyond mere unemployment insurance. There is a dire need for a comprehensive unemployment protection system: A system that will combat unemployment and (above all) promote employment.

³² See, generally, Statistics South Africa *Labour Force Survey: March 2005* (Statistics South Africa (2005)) ix-xi and National Labour and Economic Development (NALEDI) *Highlights of Current Labor Market Conditions in South Africa* (Global Policy Network (2004)) – accessed at <http://www.globalpolicynetwork.org>.

³³ See paragraph 1.2. above.

³⁴ See, generally, Aliber M “Chronic poverty in South Africa: Incidence, causes and policies” (2003) 31 *World Development* 473, Carter M and May J “Poverty, livelihood and class in rural South Africa” (2001) 27 *World Development* 1, Carter M and May J “One kind of freedom; Poverty dynamics in post-apartheid South Africa” (2001) 29 *World Development* 1987, Leibbrandt M and Woolard I “The labour market and household income inequality in South Africa: Existing evidence and new panel data” (2001) 13 *Journal of International Development* 689, Swartz L “Poverty, population dynamics and unemployment in South Africa, with reference to the four major racial groups” Paper presented at the Joint Population Conference, University of Pretoria, 2-4 October 2001, and McDonald S and Piesse J “Legacies of apartheid: The distribution of income in South Africa” (1999) 11 *Journal of International Development* 985.

³⁵ See, for example, Olivier MP and Kalula ER “Scope of coverage” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (Lexisnexis/Butterworths (2003)) 123.

4.2. Limitations of the study

4.2.1. Legal inquiry

Notwithstanding the multidisciplinary nature of the unemployment protection system, this study is mainly a legal inquiry from a policy perspective. Reference will nevertheless be made to other fields of study wherever and whenever necessary.

4.2.2. International standards and specific country perspectives

International standards and specific country perspectives examined in this study³⁶ do not necessarily mean that the unemployment protection approaches found in these regions and countries can be directly transplanted into the South(ern) African environment. It is nevertheless crucial for a study of this nature to take into account such approaches and reflect on the possible lessons that can be learnt from other parts of the world.

5. RESEARCH PROCEDURE

5.1. Introduction

The core research involves the collection of data and the study of relevant legal provisions (in books, statutes, internet resources and articles in journals (both local and foreign)). The research draws on the experience and/or approach of international organisations (namely the ILO, Council of Europe and the EU) and other countries (namely, Germany and India) where relevant research has been undertaken and/or relevant exercises or experiments in, among others, alternative measures for unemployment prevention and the (re)integration of the unemployed have been put into place. The international organisations and specific country perspectives examined in this study are as follows: the ILO (international standards), Council of Europe, European Union (EU), and Southern African Development Community (SADC) (supranational and regional approaches); Germany (developed country approach); and India (developing country approach). There is indeed no doubt that an analysis of unemployment protection system approaches adopted by the foregoing selected jurisdictions could make a valuable contribution to the debate and subsequent reforms in South Africa on these issues.

³⁶ See paragraphs 5.2. and 5.3. below.

5.2. International, supranational and regional standards

5.2.1. International standards

The demise of apartheid facilitated the return of South Africa to the international arena. The chapter on international, supranational and regional standards,³⁷ is therefore of crucial importance for the following non-exhaustive reasons:³⁸ South Africa, which is a member of the ILO, has signed and ratified a variety of international instruments³⁹ which have an impact on its unemployment protection system;⁴⁰ the Constitution of South Africa obliges courts to consider international law when interpreting the Bill of Rights;⁴¹ South African courts have a constitutional obligation, when interpreting legislation, to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law;⁴² and the ILO is constantly involved in a variety of initiatives which are of policy significance and which cover areas relevant to this study as diverse as social security for the informal economy,⁴³ extension of social security coverage (in

³⁷ That is chapter 4 of the thesis.

³⁸ Also see paragraph 1. of chapter 4.

³⁹ Before an international agreement can be law in South Africa, such an instrument must be (a) *signed* by the national executive (s 231(1) of the Constitution), (b) *ratified* by parliament (s 231(2) of the Constitution) and (c) *enacted* into law by national legislation (s 231(4) of the Constitution). There are exceptions to the preceding statement. For instance, an international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession bind South Africa without approval by parliament (s 231(3) of the Constitution). Furthermore, a self-executing provision of an agreement that has been approved by Parliament is law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament (s 231(4) of the Constitution). It should be kept in mind that “[a]n [international] agreement which has been signed and ratified, but not yet [enacted into law by national legislation], remains binding on South Africa within the international arena” (Jansen van Rensburg L and Olivier MP “International standards” in Olivier MP *et al* (eds) *Introduction to Social Security* (LexisNexis/Butterworths (2004)) 163 at 166). See Dugard J *International Law: A South African Perspective* (2nd ed) (2000)) 54-59.

⁴⁰ E.g., *Unemployment Convention* 2 of 1919; *Equality of Treatment (Accident Compensation) Convention* 19 of 1925; *Minimum Wage-Fixing Machinery Convention* 26 of 1928; *Forced Labour Convention* 29 of 1930; *Workmen’s Compensation (Occupational Diseases) Convention (Revised)* 42 of 1934; *Underground Work (Women) Convention* 45 of 1935; *Convention Concerning Statistics of Wages and Hours of Work* 63 of 1938; *Final Articles Revision Convention* 80 of 1946; *Freedom of Association and Protection of the Right to Organise Convention* 87 of 1948; *Equal Remuneration Convention* 100 of 1951; *Abolition of Forced Labour Convention* 105 of 1957; *Discrimination (Employment and Occupation) Convention* 111 of 1958; *Occupational Safety and Health Convention* 155 of 1981; *Safety and Health in Mines Convention* 176 of 1995; and *Worst Forms of Child Labour Convention* 182 of 1999. See paragraph 2. in chapter 4.

⁴¹ S 39(1)(b) of the Constitution.

⁴² S 233 of the Constitution.

⁴³ See, for example, Van Ginneken W (ed) *Social Security for the Excluded Majority: Case Studies of Developing Countries* (ILO (1999)), Schlyter C *International Labour Standards and the Informal Sector: Developments and Dilemmas* (ILO Employment Sector (2002/3)), ILO *Women and Men in the Informal Economy: A Statistical Picture* (ILO (2002)), Lund F and Srinivas S *Learning for Experience: A Gendered Approach to Social Protection for Workers in the Informal Economy* (ILO (2000)) and Van Ginneken W *Social Security for the Informal Sector: Issues, Options and Tasks Ahead* (ILO (1996)).

general),⁴⁴ and decent work.⁴⁵ It is, therefore, submitted that South Africa stands to benefit from the findings and policy proposals flowing from these initiatives.

5.2.2. Supranational and regional standards

South Africa is a member of SADC.⁴⁶ Its membership comes with a variety of obligations. Some of these obligations flow directly from the Protocols and other regional instruments⁴⁷ which it signed and ratified (inclusive of the instruments which make provision for social protection issues). It therefore follows that South Africa's social policies need to be in conformity with the goals, vision and obligations of ratified SADC (and other international) instruments. In addition, it is important for this study to consider experiences in other regions (such as the Council of Europe and EU) and benchmark them against those found in (or envisaged by) SADC at both regional and country level. This exercise includes important areas such as the coordination of social security schemes.

5.3. Specific country perspectives

As mentioned above, the study (apart from the international, supranational and regional standards) examines the unemployment protection systems of Germany and India. These two countries differ significantly when compared with each other or even South Africa. The

⁴⁴ Van Ginneken W "Extending social security: Policies for developing countries" (2003) 142 *International Labour Review* 277, Chaabane M *Towards the Universalization of Social Security: The Experience of Tunisia* (ILO (2002)), Cruz-Saco MA *Labour Markets and Social Security Coverage: The Latin American Experience* (ILO (2002)) and Reynaud E *The Extension of Social Security Coverage: The Approach of the International Labour Office* (ILO (2002)).

⁴⁵ See, for example, Bescond D *et al* "Seven indicators to measure decent work: An international comparison" (2003) 142 *International Labour Review* 179, Ghai D "Decent work: Concept and indicators" (2003) 142 *International Labour Review* 113, ILO *Decent Work and the Informal Economy: Abstracts of Working Papers* (ILO (2002)), Parissotto A "Economic globalisation and the demand for decent work" in Blanpain R and Engels C (eds) *The ILO and the Social Challenges of the 21st Century: The Geneva Lectures* (Kluwer (2001)) 1, Servais J "The future of work and related security: A discussion of the need to place matters in perspective" in Blanpain R and Engels C (eds) *The ILO and the Social Challenges of the 21st Century: The Geneva Lectures* (Kluwer (2001)) 11, Oates S "International labour standards: The challenge of the 21st century" in Blanpain R and Engels C (eds) *The ILO and the Social Challenges of the 21st Century: The Geneva Lectures* (Kluwer (2001)) 93, Kucera D "Decent work and rights of work: New measures of freedom of association and collective bargaining" in Blanpain R and Engels C (eds) *The ILO and the Social Challenges of the 21st Century: The Geneva Lectures* (Kluwer (2001)) 125, Egger P and Sengenberger W "Decent work issues and policies" – accessed at <http://www.ilo.org/public/English/bureau/dwpp/papers/dwpolicy.htm>, and ILO *Decent Work* (International Labour Conference 87th Session 1999).

⁴⁶ The Southern African Development Community (SADC) is a regional organisation comprising of fourteen countries situated in southern Africa (i.e. Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe).

⁴⁷ See paragraph 5.1.2. in chapter 4.

difference between the three countries lies in a variety of areas which range from, among others, the level of economic development to the population size. Having said that, it is important for this study to investigate the approaches adopted (by unemployment protection systems) in these countries. The foregoing assertion stems from, among others, the value of lessons to be learnt from experiences in other jurisdictions. The South African Constitution, which is the supreme law of the country, indirectly appreciates the value of foreign experiences by providing South African courts with a discretion to consider foreign law when interpreting the Bill of Rights.⁴⁸ It should be recalled that the Bill of Rights provides every person with a right of access to social security.⁴⁹

With the foregoing in mind, Germany and India have been preferred above other countries for the following non-exhaustive reasons:

(a) Germany

Germany is, among other developed countries of the world, a champion of what could be referred to as a comprehensive unemployment protection system. That is a system characterised by, among others, the following: unemployment benefits are provided in accordance with the three social security principles, i.e. the social insurance principle (unemployment insurance), the maintenance principle (unemployment assistance) and the public welfare principle (social assistance);⁵⁰ and unemployment benefits are supported by measures aimed at, *inter alia*, the promotion of employment, prevention of unemployment and the (re)integration of the unemployed.⁵¹ The German

⁴⁸ S 39(1)(c) of the Constitution. The foreign law conscious approach adopted by the South African Constitution is to be welcomed. South Africa, with its relatively young Bill of Rights could particularly in the area of socio-economic rights, learn from the (comparable) constitutional jurisprudence of other countries. The Constitutional Court has, as a matter of fact, exercised its discretion on a number of occasions and referred to foreign laws and court decisions (e.g. *S v Makwanyane* 1995 3 SA 391 (CC); 1995 6 BCLR 665 (CC)). Even so, it did, nonetheless, issue a warning against the use of foreign law and cases in interpreting the South African Constitution. The main reason behind such a warning is the “different contexts within which other constitutions were drafted, the different social structures and milieu existing in those countries as compared with those in this country, and the different historical backgrounds against which the various constitutions came into being” (*Park-Ross v Director, Office of Serious Economic Offences* 1995 (2) SALR 148 (CC) at 160).

⁴⁹ S 27(1)(c) of the Constitution. Also see paragraph 1.2.2. in chapter 3.

⁵⁰ See, generally, Heer B “Employment and welfare effects of a two-tier unemployment compensation system” (2003) 10 *International Tax and Public Finance* 147 and Burtless G and Schaefer H *Earnings Insurance for Germany* (Brookings Institution Policy Brief 104 (2002)). Also see paragraph 1.3. in chapter 5.

⁵¹ See, generally, Knuth M “How long does it take to turn around a tanker?” – Worker displacement and preventative labour market policy in Germany” in Klemmer P and Wink R (eds) *Preventing Unemployment in Europe: A New Framework for Labour Market Policy* (Edward Elgar (2000)) 65, Weiss M and Schmidt M “Job creation policies in Germany – The role of labour law, social security law and industrial relations” in Biagi M (ed) *Job Creation and Labour Law: From Protection Towards Pro-action* (Kluwer (2000)) 145 and Feist H and

unemployment protection system recently implemented major labour market and unemployment protection reforms in a quest to avert, *inter alia*, an eminent collapse of the unemployment benefits system (due to unsustainability) and a rigid labour market system.⁵² With the foregoing in mind, Germany has been selected in this study with a deliberate aim of showing that useful insights can be gained from both the positive and the negative experiences of a foreign system. There is a variety of valuable lessons that South Africa can learn from Germany's unemployment protection system. The preceding assertions reinforce this study's stance that, a developed country's model cannot, due to socio-economic differences, be successfully transplanted to the South African set-up. Furthermore, it breaks away from the notion that the focus should be on lessons to be learnt only from success stories.

(b) India

India, as a developing country, has much in common with South Africa. India is, for example, challenged by high unemployment and a huge informal economy.⁵³ Notwithstanding that, India is preferred above other developing countries for, among others, the remarkable developments in that country which could be of interest to South Africa. These remarkable developments include, among others, the recent pilot project to extend social security to the unorganised sector,⁵⁴ its long history of public

Schöb R *Workfare in Germany and the Problem of Vertical Fiscal Externalities* (CESifo Working Paper 185 (1999)).

⁵² See, for example, Ueber T "Agenda 2010: Reform of German labour law: Impact on hiring and firing staff" (2004) 5 *German Law Journal* 135, Graser A "From the hammock onto the trampoline: Workfare Policies in the U.S and their reception in Germany" (2003) 4 *German Law Journal* 201, European Commission *European Employment Observatory Review: Spring 2003* (European Commission (2003)) 12-15, 31-33 and 85-97, Federal Republic of Germany *National Action Plan of Employment Policy* 2003 (Federal Republic of Germany (2003)), Keller B "The Hartz Commission recommendations and beyond: An intermediate assessment" (2003) 19 *International Journal of Comparative Labour Law and Industrial Relations* 363 and Waas B "Temporary agency work in Germany: Reflections on recent developments" (2003) 19 *International Journal of Comparative Labour Law and Industrial Relations* 387.

⁵³ See, for example, Justino P *Social Security in Developing Countries: Myth or Necessity? – Evidence from India* (PRUS Working Paper No. 20 (2003)), Saini DS "Labour organization and labour relations law in India: Implications for poverty alleviation" in Williams L *et al* (eds) *Law and Poverty: The Legal System and Poverty Reduction* (Zed (2003)) 269, Unni J and Rani U "Social protection for informal workers in India: Insecurities, instruments and institutional mechanisms" (2002) 34 *Development and Change* 127, Williams G *et al* "Participation and power: Power people's engagement with India's Employment Assurance Scheme" (2003) 34 *Development and Change* 162, Dasgupta S *Organizing for Socio-Economic Security in India* (ILO (2002)) and Saini DS "India" in Van Eeckhoutte W (ed) *Social Security Law* (International Encyclopaedia of Laws Vol. 2) (Kluwer (2001)).

⁵⁴ See The Unorganised Sector Workers' Social Security Scheme – accessed at <http://www.labour.nic.in/ss/socialsecurityunorganised.pdf>.

works programmes⁵⁵ and the success of its member organisation-based informal safety nets.⁵⁶

6. ORGANISATION OF STUDY

This study is divided into six chapters, namely: general background (the current chapter); conceptual and theoretical framework; unemployment protection in South Africa; international, supranational and regional standards; specific country perspectives; and conclusions and recommendations.

6.1. Chapter 1: General background

This chapter sets the framework for this study. It does that by describing, among others, the employment and unemployment trends in South Africa; the problem to be studied; the significance of the study; the limitation of the study; the proposed research procedure; and the organisation of the study.

6.2. Chapter 2: Conceptual and theoretical framework

The inclusion of this chapter on the conceptual and theoretical framework of unemployment protection was necessitated by the fact that unemployment protection is not a fixed subject. The concepts and theories behind unemployment protection vary from one setting to another. It is for this reason that this chapter endeavours to draw the parameters and the scope of the relevant concepts and theories in unemployment protection. In the process, this chapter frequently distinguishes between developing countries (South Africa included) and developed countries in as far as the conceptualisation and theorisation of unemployment protection are concerned.

6.3. Chapter 3: Unemployment protection in South Africa

Chapter 3 focuses on unemployment protection in South Africa by critically analysing the following important issues: the impact of the Constitution on the unemployment protection system; the unemployment insurance scheme (strengths, weaknesses, challenges and

⁵⁵ See paragraph 2.3.3. in chapter 5.

⁵⁶ See paragraph 2.4.3.3. in chapter 5.

possibilities); public programmes involved in unemployment protection endeavours (role and challenges); other important unemployment coping strategies and/or mechanisms (e.g. informal social security); and analysing the various employment protection measures available in South Africa.

6.4. Chapter 4: International, supranational and regional standards

This chapter evaluates several unemployment protection approaches in a selection of international organisations, namely: the ILO, the EU, the Council of Europe and SADC.

6.5. Chapter 5: Specific country perspectives

Chapter 5 examines the approaches adopted in the unemployment protection systems of a developed country (Germany) and a developing country (India).

6.6. Chapter 6: Conclusion and recommendations

Chapter 6 provides a summary of the conclusions reached throughout the study and key (legal, policy and other) recommendations for policy makers and other stakeholders in the area of unemployment protection in South Africa.

7. CONCLUSION

The undesirable state of the South African unemployment protection system, undoubtedly, calls for a long overdue comprehensive revamping of the system. A comprehensive unemployment protection system that will cease to view unemployment insurance as the only major component of the South African system is required. This is necessitated by the problems associated with the high levels of unemployment that South Africa has to wrestle with. The preceding pronouncements should not be understood as implying that unemployment insurance is insignificant. Unemployment insurance has an important role to play in an unemployment protection system. However, on its own, unemployment insurance is unable to deal with all the unemployment protection needs of a country. It is on the basis of the foregoing argument that this study argues in favour of a revamped system that would, amongst others, through a variety of programmes and measures: strive towards

“complementarity between unemployment benefits and employment protection”,⁵⁷ and extend coverage to the vulnerable groups (such as those persons who work in the informal economy).⁵⁸

⁵⁷ Van Ginneken W “The global campaign on social security and coverage for all” Paper presented at the International Conference on Globalization and the Welfare State? World Society, Transnational Social Policy and New Welfare States in Transitional Countries, Delmenhorst, Germany, 8-10 February 2004.

⁵⁸ This could include other unemployment protection measures outside the realm of unemployment insurance, such as social assistance.

CHAPTER 2

CONCEPTUAL AND THEORETICAL FRAMEWORK

1. CONCEPTUAL FRAMEWORK

1.1. Introduction

Prior to an attempt being made in this thesis to suggest possibilities for (re)designing the unemployment protection system, it is of paramount importance that the conceptual and theoretical foundation be laid. This is crucial particularly in view of the ever-changing challenges unemployment protection systems have to contend with. It is essential to draw the parameters and the scope of the key concepts and theories in unemployment protection for they vary from one area of study to another.⁵⁹ In addition, what appears appropriate in one setting does not necessarily imply that it will function well with or in another. The situation of developing countries, for example, is sometimes (if not always) different from that of developed countries and, as a result, requires different approaches and at times new or alternative concepts.⁶⁰

⁵⁹ In this study the concept of ‘unemployment protection system’ is used in its broadest sense. That is, it encompasses both unemployment protection (i.e. a variety of measures and responses aimed at, *inter alia*, cushioning the effect of unemployment on unemployed persons such as the unemployment insurance benefits, unemployment assistance and the citizenship income grants) and employment protection (i.e., in general terms, a wide array of measures and policies that are aimed at ensuring continued employment of employed persons such as the procedures to be followed prior to a dismissal). This approach is based on the thinking that unemployment prevention is a key ally of unemployment protection and the other way round. Unemployment need to be prevented (where possible) by adequate employment protection (e.g. protection against unfair dismissal). In addition, unemployment protection should kick in where and when employment protection fails. Nonetheless, this does not imply that the two cannot or do not operate in tandem. Often in practice, employment protection and unemployment protection mutually reinforce each other. For example, in situations where employment protection failed to protect employment (in most instances) unemployment protection steps in to cushion the effects of unemployment. Employment protection, on the other hand, plays a significant role of ensuring that individuals keep their employment and by so doing prevents unnecessary reliance on or need for unemployment protection.

⁶⁰ See, for example, Byrne D and Strobl E *Defining Unemployment in Developing Countries: The Case of Trinidad and Tobago* (Centre for Research in Economic Development and International Trade (2001)) and Richards P *Towards the Goal of Full Employment: Trends, Obstacles and Policies* (ILO (2001)) 14-19.

1.2. Unemployment

1.2.1. Introduction: Defining unemployment

The definition of unemployment differs from one area of study to another.⁶¹ Nevertheless, two definitions of unemployment are identifiable, namely the narrow definition of unemployment and the expanded definition of unemployment.

1.2.2. Narrow definition of unemployment

Statistics South Africa describes the narrow definition of unemployment (sometimes referred to as the strict or official definition of unemployment) as involving a condition (being without employment), an attitude (a desire for employment) and an activity (searching for employment).⁶² In accordance with the narrow definition, the ‘unemployed’ are described as those people within the economically active population⁶³ who did not work during the seven days prior to the interview; want to work and are available for work within two weeks of the interview; and have taken active steps to look for work or to start some form of self-employment in the four weeks prior to the interview.⁶⁴

1.2.3. Expanded definition of unemployment

The expanded definition of unemployment, unlike the narrow definition, excludes the criterion that an unemployed person must have taken active steps to look for work or to start some form of self-employment in the four weeks prior to the interview. Accordingly, as

⁶¹ See generally Cawker G *Confronting Unemployment in South Africa* (Human Sciences Research Council (1993)) 2-3; Bromberger N “Unemployment and categories of unemployment” in Voster WS (ed) *On Being Unemployed and Religious* (University of South Africa (1992)) 2; Junukar PN “Long-term unemployment in Australia: Problems of memory and measurement” in Verhaar CHA *et al* (eds) *On the Mysteries of Unemployment: Causes, Consequences and Policies* (Kluwer (1992)) 359.

⁶² See Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2004)) xxiv and Standing G *et al Restructuring the Labour Market: The South African Challenge* (ILO (1996)) 103.

⁶³ The economically active population consists of both those who are employed and those who are unemployed. Its size therefore varies according to the definition of employment used. See Okin FM *Unemployment and Employment in South Africa* (Statistics South Africa (1998)) 1.

⁶⁴ Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2005)) xxiv.

pointed out earlier,⁶⁵ the expanded definition includes the so-called discouraged work-seekers.

1.2.4. Defining unemployment: A critique

1.2.4.1. Did not work during the seven days prior to the interview

In the light of both the narrow and expanded definitions of unemployment, an unemployed person is, basically, a person who is without an income-generating activity which is recognised as work by appropriate authorities (such as the state). This brings us to the question what is ‘work’? ‘Work’, as explained by Zacher:

“...denotes income, productiveness and social position. It is associated with performance and responsibility. The nature of work involves (a minimum degree of) freedom. When speaking of work for the purpose of earning a living, the income aspect acquires special importance. Gainful work can be performed in a self-employed capacity, within co-operative structures or in dependent employment.”⁶⁶

Notwithstanding Zacher’s explanation, work in its narrow sense refers to paid employment. This study rejects this view because the narrow definition excludes unpaid work which often includes care work and unpaid family work.⁶⁷ Furthermore, unemployment is not always

⁶⁵ See fn 8.

⁶⁶ Zacher H “The living conditions of the unemployed, their diversity and the effects of alternative welfare provision systems” in Acher M and Malinvaud E (eds) *The Future of Labour and Labour in the Future: Proceedings – Second Plenary Session of the Pontifical Academy of Social Sciences 20-23 March 1996* (Pontifical Academy of Social Sciences (1998)) 123 at 123.

⁶⁷ This is prejudicial to women, particularly those in South Africa and the rest of the African continent, due to their enormous involvement in the so-called ‘care economy’. The issue here is that their activities in the care economy are not regarded as work for social security purposes (especially in the area of social insurance which is, particularly in South Africa, formal employment based). See, for illuminating arguments on care work, Williams J “From difference to dominance to domesticity: Care as work, gender as tradition” (2001) 76 *Chicago-Kent Law Review* 1441, Silbaugh KB “Foreword: The structures of care work” (2001) 76 *Chicago-Kent Law Review* 1389, Fineman MA “Contract and care” (2001) 76 *Chicago-Kent Law Review* 1403, Becker M “Caring for children and caretakers” (2001) 76 *Chicago-Kent Law Review* 1495, Roberts DE “Kinship care and the price of state support for children” (2001) 76 *Chicago-Kent Law Review* 1619, McClain L “Care as a public value: Linking responsibility, resources, and republicanism” (2001) 76 *Chicago-Kent Law Review* 1673. Also see Lund F and Srinivas S “Learning from experience: A gendered approach to social protection for women in the informal sector economy” Overview Paper for ILO-WIEGO Seminar on Social Protection for Women Workers in the Informal Economy (1999) – accessed at <http://www.wiego.org/papers/lund.pdf>.

about being without work. One can work and remain classified as unemployed.⁶⁸ With the foregoing in mind, ‘work’ must be understood within the thinking that:

“The category of unemployment presupposes a distinction between work and employment. Some form of “work” is always available, even if it is only begging, searching through dumpsters, or shining shoes. “Unemployment” is premised on the designation of a certain subset of more suitable work... with its own institutional rules and policy supports. The meaning of unemployment therefore depends largely on the meaning of employment. The meaning of unemployment depends on what forms of work governments regard as exemplifying “employment,” as against more general notions of “work.” Not all productive effort counts as employment. Governmental protections, rights, and requirements pertain only to certain kinds of work activity. Employment and social policies inevitably designate which types of individual needs constitute legitimate claims on the state for support in lieu of this employment.”⁶⁹

1.2.4.2. Taken active steps to look for work or to start some form of self-employment in the four weeks prior to the interview

The narrow definition of unemployment, unlike the expanded definition, requires a person to have taken active steps to look for work or to start some form of self-employment in the four weeks prior to the interview before he or she may be classified as unemployed. This requirement excludes discouraged work-seekers as it draws a line of demarcation between active jobseekers and passive jobseekers.⁷⁰ The active job search criterion can at times be

⁶⁸ Certain definitions of unemployment, as a result, include partial unemployment as part of being without work. Germany, for example, statutorily defines an unemployed person as a person who either has no work or is working less than 15 hours a week. Weiss M and Schmidt M “Job creation in Germany: The role of labour law, social security law and industrial relations” in Biagi M (ed) *Job Creation and Labour Law: From Protection Towards Pro-action* (Kluwer (2000)) 145 at 146.

⁶⁹ Baxandall P “Explaining differences in the political meaning of unemployment across time and space” (2002) 31 *Journal of Socio-Economics* 469 at 480.

⁷⁰ According to the *Resolution Concerning Economically Active Population, Employment, Unemployment and Underemployment* (October 1982) (abbreviated the 1982 ILO Resolution), as cited by Carlson (Carlson E Differing Labour Market Concepts, Definitions and Measurements: Japan, USA, Australia (Centre of Full Employment and Equity (2001)) 13), seeking work as embodied in this criterion means that one had: “...taken specific steps in a specified recent period to seek paid employment or self-employment. The specific steps may include registration at a public or private employment exchange; application to employers; checking at worksites, farms, factory gates, market or the assembly places; placing or answering newspaper advertisements; seeking assistance of friends or relatives; looking for land, building, machinery or equipment to establish own enterprise; arranging for financial resources; applying for permits and licences, etc.”

referred to as inappropriate for a developing country⁷¹ such as South Africa. This is primarily because a majority of the unemployed people in South Africa are concentrated in rural areas which are remote from urban areas where one can, for example, literally check worksites, factories or assembly points. The other issue is that most of these people struggle to make ends meet which means that it could be a tedious exercise to raise resources so that one can travel to urban areas to actively seek work as required by this criterion.⁷² In addition, rural areas in South Africa (as typical in developing countries) lack “clear channels for the exchange of labour market information.”⁷³ Another issue which should not be overlooked is the severe unavailability of work opportunities in South Africa. It is for the foregoing reasons that this study favours the expanded definition of unemployment, above the narrow definition, for it excludes the active work search criterion. The exclusion of the active search for work criterion makes the expanded definition (generally speaking) appropriate for developing countries.

1.3. Categories of unemployment

Five categories of unemployment are generally recognised, namely, frictional unemployment, technological unemployment, structural unemployment, cyclical unemployment and seasonal unemployment.

1.3.1. Frictional unemployment

Unemployment is considered to be “frictional during the interval in which a worker who has lost a job is seeking relatively comparable employment in a [favourable] market.”⁷⁴ This type of unemployment “exists not because there is a shortage of jobs but because it takes time for the workers concerned to find the jobs that are available or for the competent authorities to

⁷¹ See Vodopivec M and Raju D “Income support systems for the unemployed: Issues and options” Background paper prepared for the WBI Labor Market Policy Course, Washington, 3-14 March 2003.

⁷² See Byrne D and Strobl E *Defining Unemployment in Developing Countries: The Case of Trinidad and Tobago* (Centre for Research in Economic Development and International Trade (2001)) 21.

⁷³ *Ibid* 1.

⁷⁴ Blaustein SJ and Craig I *An International Review of Unemployment Insurance Schemes* (The W.E. Upjohn Institute for Employment Research (1977)) 7.

match jobseekers and job openings.”⁷⁵ In addition, frictional unemployment is typically of short duration.⁷⁶

1.3.2. Technological unemployment

Technological unemployment is unemployment that results from the displacement of workers by labour-saving machinery, by new production techniques, or by new management methods. Many workers seeking employment find that technological change has reduced the number of unskilled and semiskilled manufacturing jobs for which they qualify. Also, technological change may result in the closing of obsolete plants and facilities, which can cause severe economic distress to many communities.⁷⁷

1.3.3. Structural unemployment

Structural unemployment can be defined as unemployment that results from a mismatch between skills required for the available jobs and skills possessed by workers seeking work. Structural unemployment can also occur from a mismatch between the geographical location of available jobs and job seekers.⁷⁸ As the ILO puts it, the seriousness of this type of unemployment from the perspective of individual workers lies not only in its widespread incidence but also particularly in the grave danger that they may remain out of work for a long time.⁷⁹

1.3.4. Cyclical unemployment

Cyclical unemployment (also called ‘demand-deficient’ unemployment) is “unemployment that results from a deficiency in aggregate demand; that is total spending in the economy, or

⁷⁵ *Ibid.*

⁷⁶ Blaustein SJ and Craig I *An International Review of Unemployment Insurance Schemes* (The W.E. Upjohn Institute for Employment Research (1977) 7 and ILO *Unemployment Insurance Schemes* (ILO (1955)) 4.

⁷⁷ Redja GE *Social Insurance and Economic Security* (Englewood Cliffs (1994)) 344.

⁷⁸ *Ibid.*

⁷⁹ ILO *Unemployment Insurance Schemes* (ILO (1955)) 3.

total aggregate demand of goods and services, is insufficient for generating an adequate number of jobs to provide full employment.”⁸⁰

1.3.5. Seasonal unemployment

Seasonal unemployment tends to recur periodically in particular months of each year. In the same way, it also normally tends to disappear with the advance of the seasons. According to the ILO, “[i]t is usually the result either of a seasonal pattern inherent in the production processes of certain industries, or of seasonal variation in the demand of certain goods.”⁸¹ Seasonal unemployment can result from fluctuations in business activity because of weather, customs, styles and habits. Agriculture and construction are two important seasonal industries, with wide swings in employment throughout the year.⁸²

1.4. Employability

The concept of ‘employability’ has been defined as “putting someone in a position to be employed or to maintain employment.”⁸³ It can, therefore, be argued that the meaning of employability, in the fight against unemployment and the promotion of employment varies between the following important role players (in employment promotion as well as unemployment prevention), i.e.: an individual, enterprise (employer) and the state. In the case of an individual, employability means “the capacity to find, keep and change employment, including the ability to generate self-employment.”⁸⁴ It therefore follows that: “Employability is closely connected with the vertical and horizontal mobility of workers in the labour market and requires a maximum of flexibility and adaptability from the individual. It is a continuing process of the successful transition from school to initial employment, progress on the career ladder and/or the generation of employment for oneself.”⁸⁵ The meaning of employability in a situation of an enterprise differs significantly from that of an

⁸⁰ Redja GE *Social Insurance and Economic Security* (Englewood Cliffs (1994)) 343.

⁸¹ ILO *Unemployment Insurance Schemes* (ILO (1955)) 4.

⁸² Redja GE *Social Insurance and Economic Security* (Englewood Cliffs (1994)) 345.

⁸³ Swedish Co-operative Institute *et al Contribution of Mutual and Bilateral Social Protection to Employment and Employability: European Report* (1998)) 25.

⁸⁴ *Ibid.*

⁸⁵ *Ibid* 6-7.

individual. It means, an enterprise's "human resources are sufficiently adaptable and flexible to respond to changing requirements in the workplace and to enhance enterprise competitiveness and growth."⁸⁶ The concept of employability for the state signifies "creating a workforce that is flexible and adaptable to the changing demands of the labour market as a critical step towards achieving the objective of full employment."⁸⁷ Notwithstanding the foregoing, it is of paramount importance to note that the concept of employability is directly linked to the availability of jobs since "the concept of employability presumes that jobs are available for workers in the labour market."⁸⁸ No matter how employable an individual can be, the absence of job(s) would invariably render the fact that he/she is employable pointless.

The aforesaid meanings of employability as regards an individual, an enterprise and the state can be interpreted as imposing obligations on the role players as individuals and also as a collective. In a case of an individual, for example, it appears that for him/her to remain employable he/she has a duty to regularly improve his ability, to keep and change employment.⁸⁹ Needless to say, it appears that there is a duty on the role players to work together in an attempt to ensure and secure employability.

There are several factors that affect employability. Such factors, as pointed out by Mitchell,⁹⁰ include labour demand, labour market information, vocational guidance and counselling, recognition of prior learning and skills assessment, education and training, employment practices, work organisation, equity policies, human resources planning and labour relations.

⁸⁶ *Ibid* 7.

⁸⁷ *Ibid*.

⁸⁸ Mitchell AG *Strategic Training Partnerships between the State and Enterprises* (ILO (1998)) 6.

⁸⁹ The finding, keeping and changing of employment is not limited to being employed by another employer but goes much beyond that to include self-employment. Self-employment has in recent times turned out to be one of those essential tools in the fight against unemployment. This is evident from the importance accorded by various countries and stakeholders (both at national and international level) to self-employment as well as self-employed workers. See, generally, Engblom S "Equal treatment of employees and self-employed workers" (2001) 17 *International Journal of Comparative Labour Law and Industrial Relations* 211, Galin A "Small manufacturing enterprises as a form of flexibility" (1999) 15 *International Journal of Comparative Labour Law and Industrial Relations* 289, Renga S "The role of the Italian social security system for the unemployed in the labour market" in Biagi M (ed) *Job Creation and Labour Law* (Kluwer (2000)) 195 at 208-209 and (most importantly) "Self-employment policies: Review on the bridging benefits for promoting self-employment in Germany and measures to promote self-employment of unemployed persons in Italy" – accessed at <http://peereview.almp.org/pdf/en991oex.pdf>.

⁹⁰ Mitchell AG *Strategic Training Partnerships between the State and Enterprises* (ILO (1998)) 7.

1.5. Employment

One of the definitions attached to employment is that it is “a situation in which remuneration in cash or in kind is received in exchange for active, direct personal participation in the production process.”⁹¹ In the light of the foregoing definition it, therefore, follows that:

“This fundamental relationship (a livelihood in exchange for participation in production) can be formulated at several levels: (1) the individual; (2) the family unit or restricted family group (father, mother and children or family); (3) the social group constituting a production and consumption unit (a village living by subsistence farming in certain types of social organisation, for example).”⁹²

While it is undeniable that there is a proliferation of definitions of ‘employment’,⁹³ the following aspects of employment by Sen deserve special mention. Sen distinguishes between three aspects of employment, which are: an income aspect: employment gives an income to the employed; a production aspect: employment yields an output; and a recognition aspect: employment gives a person the recognition of being engaged in something worthwhile.⁹⁴

1.6. Social exclusion

1.6.1. Introduction

The rationale behind an unemployment protection system, at least in the 21st century, is to curb as well as to deal with the effects of social exclusion.⁹⁵ This is precisely due to, as pointed out earlier in this study,⁹⁶ the effect of unemployment on the individual, family, society, economy and, most importantly, the state. Even so, many unemployment protection systems, particularly in developing countries, are yet to come to grips with the prevention of the exclusion and marginalisation of certain categories of persons. What they do is to pay too

⁹¹ Mouly J “Some remarks on the concepts of employment, underemployment and unemployment” (1972) 105 *International Labour Review* 155 at 155.

⁹² *Ibid.*

⁹³ Mouly J “Employment: A concept in need of renovation” (1977) 116 *International Labour Review* 1 at 1.

⁹⁴ Sen A “Employment, institution and technology: Some policy issues” (1975) 112 *International Labour Review* 45 at 45-49.

⁹⁵ See paragraph 1.6.2. in chapter 2.

⁹⁶ See paragraph 3. (a) in chapter 1.

much attention to the replacement of income with little regard to the (re)integration of the unemployed into the formal labour market. In addition, they concern themselves only with those who are in the formal labour market. The effect of this approach is that those who find it difficult to secure a berth in the labour market due to age (foreign and native youth, and the aged), gender (single or married females of a child bearing age) and disability (people living with disabilities) are left at the mercy of unemployment and other unemployment related hardships (such as poverty). Many developed countries, either at national or regional level, have developed a variety of measures and policies to address the plight of the excluded and marginalised groups (such as (foreign and native) youth, the aged, single or married females of a child bearing age and people living with disabilities).

1.6.2. Social exclusion defined

Social exclusion has, in unemployment protection terms, at least by far, failed to acquire a universally acceptable definition.⁹⁷ The source of this situation is that:

“...the ideas about the concept depend on national and ideological contexts. Another reason for the analytic and conceptual difficulty is that social exclusion and the phenomena and social processes encompassed by social exclusion are discussed with the aid of other terms such as ‘new poverty’, ‘inequality’, ‘discrimination’, ‘underclass’, ‘surplus’, ‘marginality’, ‘alienation’ and ‘deprivation’. This means that the term must be analysed ‘onosmasiologically’, which means that the same terms are defined with reference to more than one term.”⁹⁸

It is on account of the foregoing that, unsurprisingly, there is a proliferation of social exclusion definitions. Some authors, for example, define social exclusion as a process of social disqualification,⁹⁹ whereas scholars like Kronauer¹⁰⁰ unbundled the term by identifying

⁹⁷ Notwithstanding that, the fact remains that “...the notion of social exclusion attaches considerable significance to possession of a job. The problem of social exclusion is that some groups in society are denied the opportunity to participate in the mechanisms offered by society through which they may establish meaning for their lives, the connections of a community, and a sense of self-respect. Work provides for most people one of the principal mechanisms for constructing meaning, community, and status.” (Collins H “Discrimination, equality and social exclusion” (2003) *Modern Law Review* 16 at 29).

⁹⁸ Starrin M *et al* “Comparative report” in Kieselbach T (ed) *Youth Unemployment and Social Exclusion: A Comparison of Six European Countries* (Leske + Budrich 2000) 15 at 17-18.

⁹⁹ *Ibid* 15 at 20.

six dimensions of exclusion, namely exclusion from the labour market, economic exclusion, cultural exclusion, exclusion through social isolation, institutional exclusion and spatial exclusion. Despite the diversity of definitions, these definitions have much in common. As Gore and Figueiredo¹⁰¹ assert:

“These diverse definitions have a number of common ingredients. Firstly, social exclusion is a state of ill-being and disablement (disempowerment, inability) which individuals and groups experience...Secondly, social exclusion is a feature of the structure of societies, and is manifest in recurrent patterns of social relationships in which individuals and groups are denied access to the goods, services, activities and resources which are associated with citizenship...Finally, social exclusion can be analysed both as a state and process. The former offers a way of describing social exclusion and can for instance be used to define situations of permanent exclusion.”

With the foregoing in mind, it can be argued that social exclusion has three features: social, political and economical.¹⁰² This is primarily because social exclusion originates, in most instances, from socially, politically and economically induced factors.¹⁰³ In the old South Africa, for example, there were individuals, families and communities which were socially excluded due to political factors.¹⁰⁴

1.6.3. A selection of vulnerable groups

1.6.3.1. Youth

¹⁰⁰ As cited in Starrin M *et al* “Comparative report” in Kieselbach T (ed) *Youth Unemployment and Social Exclusion: A Comparison of Six European Countries* (Leske + Budrich 2000) 15 at 21.

¹⁰¹ Gore C and Figueiredo JB (eds) *Social Exclusion and Anti-poverty Policy: A Debate* (International Institute for Labour Studies (1997)) 18.

¹⁰² See, generally, Percy-Smith J “Introduction: The contours of social exclusion” in Percy-Smith J (ed) *Policy Responses to Social Exclusion: Towards Inclusion?* (Open University Press (2000)) 1, Cartaya V *et al* *Venezuela: Exclusion and Integration – A Synthesis in the Building?* (Labour Institutions and Development Programme DP/90/1997 (1997)), Sindzingre AN “Exclusion and poverty in developing countries: Some issues” – accessed at <http://www.dse.de/ef/poverty/sindzing.htm> and Poggi A “Measuring social exclusion using the capability approach” – accessed at <http://cfs.unipv.it/sen/papers/Poggi.pdf>.

¹⁰³ See, for example, Bhalla AS and Lapeyre F *Poverty and Exclusion in a Global World* (Macmillan (1999)) 16-30.

¹⁰⁴ See, for example, McDonald S and Piesse J “Legacies of apartheid: The distribution of income in South Africa” (1999) 11 *Journal of International Development* 985.

“Young people are the future of our county. It cannot be tolerated that young people enter working age as unemployed.”¹⁰⁵

Burgeoning youth unemployment is, in both developed and developing countries, a phenomenon of grave concern.¹⁰⁶ Young unemployed persons, as a vulnerable group, may be divided in several categories. There are, for example, young unemployed persons with physical difficulties, young unemployed immigrants, young unemployed single parents, young unemployed people facing homelessness, young unemployed persons facing poverty, and young unemployed criminals.¹⁰⁷ Despite the foregoing categorisation the fact remains that young unemployed persons are faced by an assortment of problems in the labour market.¹⁰⁸ While youth unemployment cannot be traced back to a single source, there are, however, several issues which may be pointed out as contributors to rising youth unemployment. A general lack of job opportunities in the labour market tops the list. Secondly, a shortage of relevant and adequate skills (which could be attributed to lack of relevant experience, lack of qualification, inadequate training and irrelevant qualification) delays or prevents the entry of young unemployed persons into the labour market. Thirdly,

¹⁰⁵ “Immediate action programme to bring down youth unemployment: Programme for training, qualification and employment of young people” – accessed <http://www.bma.de/gb/arbeitsmarkt/100000jobs.htm>.

¹⁰⁶ O’Higgins N *Youth Unemployment and Employment Policy: A global Perspective* (ILO (2001)) 9, Raffé D “The role of vocational training and education in the combat against youth unemployment” in Groth C and Maenning W (eds) *Strategies Against Youth Unemployment: An International Comparison* (Peter Lang (2001)) 91, Schröder L “Unemployment among young people with a foreign background: The potential of active labour market programmes” in Groth C and Maenning W (eds) *Strategies Against Youth Unemployment: An International Comparison* (Peter Lang (2001)), Kanyenze G *et al* *Strategies to Combat Youth Unemployment and Marginalisation in Anglophone Africa* (ILO/SAMAT (2000)), Orr K “From education to employment: The experience of young people in the European Union” in Groth C and Maenning W (eds) *Strategies Against Youth Unemployment: An International Comparison* (Peter Lang (2001)) 147, Kieselbach T (ed) *Youth Unemployment and Social Exclusion: A Comparison of Six European Countries* (Leske + Budrich (2000)), Reyneri E “Ways and means of integrating the young unskilled into work” in Archer MS (ed) *Towards Reducing Unemployment: The Proceedings of the Fifth Plenary Session of the Pontifical Academy of Social Sciences 3-6 March 1999* (Pontifical Academy of Social Sciences 1999) 167, Mulenga LC “Youth unemployment in Africa: Policy responses, outcomes and issues in the context of globalisation” Paper presented to the Dialogue on Youth Employment, Harvard Centre for International Development, Cambridge, MA, USA, 14-15 September 1999, Council of Europe *Vocational Training and Employment: With Special Reference to Youth Unemployment* (Council of Europe (1982)), Reyneri E “Ways and means of integrating the young unskilled into work” in Archer MS (ed) *Towards Reducing Unemployment: The Proceedings of the Fifth Plenary Session of the Pontifical Academy of Social Sciences 3-6 March 1999* (Pontifical Academy of Social Sciences (1999)) 167 and Melvyn P “Youth unemployment in industrialised market economy countries” (1977) 116 *International Labour Review* 23.

¹⁰⁷ Kieselbach T (ed) *Youth Unemployment and Social Exclusion: A Comparison of Six European Countries* (Leske + Budrich (2000)).

¹⁰⁸ Melvyn P “Youth unemployment in industrialised market economy countries” (1977) 116 *International Labour Review* 23 at 25-30.

those who find their way into the world of work often exit the labour market at an early stage in situations of mass layoffs. Limited work experience and redundancy selection criteria such as ‘last in first out’ invariably promote youth unemployment. In addition, unemployment protection schemes of some countries neglect young unemployed persons.¹⁰⁹ At the end of the day a majority of the young and unemployed sector of the population is caught in ‘no man’s land’ – that is between school and the labour market.¹¹⁰

The conclusion to be drawn, particularly in the light of different categories of young unemployed persons and the variety of factors contributing to youth unemployment, is that youth unemployment is a multi-pronged problem which requires a multi-faceted solution. Measures aimed at combating youth unemployment should not be based on a ‘one size fits all’ approach. There should be measures which are aimed at the needs of, for example, young persons with physical disabilities and so forth. They may incorporate remedial measures such as training, education, employment subsidies and job creation programmes.¹¹¹

1.6.3.2. Females

Various statutory provisions and arrangements aimed at ensuring equity between men and women have (at international, supranational and national levels) seen the light of day.¹¹²

¹⁰⁹ *Ibid* at 27.

¹¹⁰ *Ibid* at 28-30.

¹¹¹ See, for example, Raffe D “The role of vocational training and education in the combat against youth unemployment” in Groth C and Maenning W (eds) *Strategies Against Youth Unemployment: An International Comparison* (Peter Lang (2001)) 91, Bediako T “Education and youth employment in Africa” in Groth C and Maenning W (eds) *Strategies Against Youth Unemployment: An International Comparison* (Peter Lang (2001)) 133, Weiss M and Schmidt M “Job creation policies in Germany – The role of labour law, social security law and industrial relations” in Biagi M (ed) *Job Creation and Labour Law* (Kluwer (2000)) 145 at 146-149 and Council of Europe *Vocational Training and Employment: With Special Reference to Youth Unemployment* (Council of Europe (1982)).

¹¹² See, for example, Rubery J *et al* “Occupational segregation, discrimination and equal opportunity” in Schmid G *et al* (eds) *International Handbook of Labour Market Policy and Evaluation* (Edward Elgar (1996)) 341, Heidi I “Supranational action against sex discrimination: Equal pay and equal treatment in the European Union” in Loutfi MF (ed) *What is Equality and How do we Get There?: Women, Gender and Work* (International Labour Office (2001)) 469 and Anker R “Theories of occupational segregation by sex: An overview” in Loutfi MF (ed) *What is Equality and How do we Get There?: Women, Gender and Work* (ILO (2001)) 129. Also see Liebenberg S and O’Sullivan M “South Africa’s new equality legislation: A tool for advancing women’s socio-economic equality?” Paper presented at the Conference on Equality – Theory and Practice in South Africa and Elsewhere, University of Cape Town, 18-20 January 2001, Gokul R “Equality and gender in African customary law in South Africa” Paper presented at the Conference on Equality – Theory and

These provisions proscribe unfair discrimination (whether direct or indirect) against females on the basis of sex, gender, pregnancy, maternity and so forth. Notwithstanding the foregoing, females (especially those of a child bearing age or those with children) find it very difficult to enter the labour market. A changing family structure is at the core of the challenge.¹¹³ More and more females are caught between the world of work and family life. This, often, results in their exclusion from income security generating activities and social protection. As Luckhaus points out:

“People caring at home for children, the elderly or persons with disabilities (i.e. not as part of a commercial arrangement) are precluded from engaging in paid employment during the period and thus from access to income from this source. Such people, therefore, must look either to their partner or to social protection for material support so long as they are engaged in this activity. However, they are not free to choose in this. Social protection systems are generally structured in such a way as to ensure that a partner is the first port of call in these situations. There is, for example, no social insurance benefit to cover the risk involved in giving up paid employment to care for children, the elderly, people with disabilities, etc. Someone engaged in informal unpaid caring work of this kind is assumed to have a partner who is a paid worker (a “breadwinner”) and, therefore, able to provide for them. Only if the breadwinner partner is not engaged in paid work (because of unemployment, sickness, old age, etc) can an unpaid worker have recourse to social protection. However, being regarded as a dependent, the unpaid worker tends not to receive the money directly, and payment is made to their breadwinner partner on their behalf.”¹¹⁴

Practice in South Africa and Elsewhere, University of Cape Town, 18-20 January 2001, Loenen T “Towards a common standard of achievement?: Developments in international equality law” Paper presented at the Conference on Equality – Theory and Practice in South Africa and Elsewhere, University of Cape Town, 18-20 January 2001, Fredman S “Equality: A new generation? – Developments in the European context” Paper presented at the Conference on Equality – Theory and Practice in South Africa and Elsewhere, University of Cape Town, 18-20 January 2001, Luckhaus L “Equal treatment, social protection and income security for women” (2002) 139 *International Labour Review* 149 and Gaudier M *The Development of the Women’s Question at the ILO, 1919-1994: 75 Years of Progress Towards Equality* (Labour Institutions and Development Programme DP/87/1996 (1996)).

¹¹³ See, for example, Caracciolo E “The ‘family-friendly’ workplace’: The EC position” (2001) 17 *International Journal of Comparative Labour Law and Industrial Relations* 325 at 325-326, Meulders D “Innovative employment initiatives and equal opportunities” in Marin B *et al* (eds) *Innovative Employment Initiatives* (Ashgate (2000)) 349 at 360 and Carnoy M “The family, flexible work and social cohesion at risk” (1999) 138 *International Labour Review* 411.

¹¹⁴ Luckhaus L “Equal treatment, social protection and income security for women” (2002) 139 *International Labour Review* 149 at 150-151.

Balancing family and work life is proving to be a daunting task to individuals, families and policy makers.¹¹⁵ The situation of South Africa is complicated by the fact that many women are excluded from unemployment protection due to the nature of the work they are involved in, which is not regarded as work for social security purposes.¹¹⁶ Care work¹¹⁷ is the case in point:

“The topic of women and work is one that should interest all women, as they are continuously working. Most of women’s work however goes unrecognised – the work in the home which is mostly only seen when not done; the work with children from pregnancy through breast-feeding through rearing infants through adolescence, the work women do in all sectors of paid work; and lastly, the work of women in the developing world which entails “house work” in the broadest sense, viz the work on the land, tilling the soil, gathering wood for cooking, while at the same time looking after numerous children.”¹¹⁸

Most women, generally speaking, suffer from a diminished capacity to engage and participate meaningfully in the labour market, particularly in developing countries, due to cultural and/or traditional narrow-mindedness. Some cultural and/or traditional beliefs and practices promote the deep involvement of women, as opposed to men, in care work within a household.¹¹⁹ According to these beliefs, a woman’s primary role in a household is that of a carer while that of a man is that of a chief provider. This translates into a situation that most women do care work – a reality which constrains their involvement in the labour market as well as in certain social insurance schemes.¹²⁰

¹¹⁵ Social policies are moulded around the ‘male breadwinner model family’ and the assumption that women take responsibility or should take responsibility for care work. See, for example, Lewis J “Legitimizing care work and the issue of gender equity” in Daly M (ed) *Care Work: The Quest for Security* (ILO (2001)) 57 at 57 and McKie L *et al* “Gender, caring and employment in Britain” (2001) 30 *Journal of Social Policy* 233.

¹¹⁶ See Dekker AH and Olivier MP “Informal social security” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 559 at 585.

¹¹⁷ See, for the meaning of ‘care’ in the context of care work, Badgett MVL and Folbre N “Assigning care: Gender norms and economic outcomes” in Loutfi MF (ed) *What is Equality and How do we Get There?: Women, Gender and Work* (ILO (2001)) 327 at 329.

¹¹⁸ Matlary JH “Women and work: The radical papal teaching” in Acher M and Malinvaud E (eds) *The Future of Labour and Labour in the Future: Proceedings - Second Plenary Session of the Pontifical Academy of Social Sciences 20-23 March 1996* (Pontifical Academy of Social Sciences (1998)) 263 at 263.

¹¹⁹ See, for example, Melkas H and Anker R *Towards Gender Equity in Japanese and Nordic Labour Markets: A Tale of Two Paths* (ILO (2003)).

¹²⁰ As pointed out by Badgett and Folbre (Badgett MVL and Folbre N “Assigning care: Gender norms and economic outcomes” in Loutfi MF (ed) *What is Equality and How do we Get There?: Women, Gender and Work* (ILO (2001)) 327 at 327): “In many different cultures, being a female is being associated with care for

1.6.3.3. People with disabilities

The labour market situation of people with disabilities is, for a number of reasons, grim. Although proscribed by international and national instruments most people with disabilities suffer from discrimination. While it is a fact that this situation affects men and women, women are nonetheless more disadvantaged than their male counterparts.¹²¹ Women with disabilities are, particularly in developing countries, more likely to be destitute, illiterate and unskilled (or even less skilled) than their male counterparts.¹²² The situation is made worse by the fact that women generally speaking have “less access to rehabilitation services, they are more likely to be without family support or community support and they often suffer greater social isolation due to disability.”¹²³

1.7. A selection of policies to combat social exclusion

1.7.1. Introduction

Attempts to combat social exclusion require a variety of policy interventions which should, *inter alia*, include labour market interventions, employability interventions and social protection interventions (to cater for the social protection needs of the socially excluded through, *inter alia*, social security, social assistance and social integration).

others. Women are generally held to higher standards of family responsibility than men. A daughter who neglects her parents, a wife who leaves a husband, a mother who abandons a child – all are considered more culpable than a son, husband or father who does the same. Gender norms governing interpretation of appropriate behaviour for women and men are closely linked to socially constructed concepts of familial altruism and individual self interest. Women, who seem highly independent or ambitious, like men who seem highly dependent or family-oriented, are often considered sexually unattractive.”

¹²¹ ILO *Vocational Rehabilitation and Employment of Disabled Persons* (ILO (1998)) 35.

¹²² *Ibid.*

¹²³ *Ibid.*

1.7.2. Labour market

While acknowledging that the best way to deal with social exclusion from an unemployment protection perspective is to create more jobs, these policy interventions are also aimed at making the labour market more accessible and accommodative to those who are excluded and marginalised from the labour market. These interventions incorporate policies which are, according to Rodgers,¹²⁴ aimed at the increase of the capacity of the unemployed to organise and to participate in society; the prevention of the exclusion of women (due to their particular needs such as child care, maternity leave, return to the labour market after child-bearing); and the prevention of unemployment and social exclusion (for example, by preventing retrenchments).

1.7.3. Improving employability and capabilities

These are those measures which are aimed at improving the employability and capabilities of those who are excluded and marginalised from the labour market through training, retraining and (re)skilling exercises.

1.7.4. Social protection

Social protection¹²⁵ policies are, within an unemployment protection context, those interventions which are aimed at the social protection needs of the unemployed (through, *inter alia*, social insurance (e.g. unemployment insurance), social assistance (e.g. unemployment assistance) and social integration (e.g. (re)integrating the unemployed into the labour market). Accordingly, the aim of social protection is to avert or minimise the impact of social risks (which include unemployment) – in that way preventing or minimising human

¹²⁴ Rodgers G “The design of policy against exclusion” in Rodgers G *et al* (eds) *Social Exclusion: Rhetoric, Reality, Responses* (International Institute for Labour Studies (1995)) 253 at 255-256.

¹²⁵ According to the Asian Development Bank (Asian Development Bank “Social protection: Reducing risks, increasing opportunities” – accessed at <http://www.adb.org/SocialProtection/default.asp>) ‘social protection’: “...consists of policies and programmes designed to reduce poverty and vulnerability by promoting efficient labour markets, diminishing people’s exposure to risks, enhancing their capacity to protect themselves against hazards and interruption/loss of income.”

damage – by increasing capabilities and opportunities.¹²⁶ As noted by the United Nations Commission on Social Development:

“The ultimate purpose of social protection is to increase capabilities and opportunities and, thereby, human development. While by its very nature social protection aims at providing at least minimum standards of well-being to people in dire circumstances enabling them to live with dignity, one should not overlook that social protection should not simply be seen as a residual policy function of assuring the welfare of the poorest – but as a foundation at a societal level for promoting social justice and social cohesion, developing human capabilities and promoting economic dynamism and creativity.”¹²⁷

Building on these approaches, the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (the Committee) recently adopted a broad approach to the concept of social protection, referred to as ‘Comprehensive Social Protection’ (CSP).¹²⁸ The Committee notes the description afforded by the United Nations Commission on Social Development, namely that: “Social protection embodies society’s responses to levels of either risk or deprivation...[t]hese include secure access to income, livelihood, employment, health and education services, nutrition and shelter.”¹²⁹

The Committee defines CSP as follows:

“Comprehensive social protection for South Africa seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development. Comprehensive social protection is broader than the

¹²⁶ Social protection is, as pointed out by Norton A *et al* (Norton A *et al* “Social protection: Defining the field of action and policy” (2002) 20 *Development Policy Review* 541 at 545), necessary so as to “(i) develop social support for reform programmes; (ii) promote social justice and equity, and make growth more efficient and equitable; (iii) provide policy-led support to those outside the labour market or with insufficient assets to achieve a secure livelihood; (iv) provide all citizens with protection against risk (including financial crises); (v) ensure basic acceptable livelihood standards for all; (vi) facilitate investment in human capital for poor households and communities; (vii) enable people to take economic risks; (viii) promote social cohesion and stability; (ix) compensate for declining effectiveness of traditional and informal systems for sustaining livelihood security; and (x) ensure continuity of access for all to the basic services necessary for developing human capital and meeting basic needs.”

¹²⁷ United Nations *Enhancing Social Protection and Reducing Vulnerability in a Globalising World: Report of the Secretary-General* (39th Session of the Commission for Social Development (2000)).

¹²⁸ Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future* (Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (2002)) 41.

¹²⁹ *Ibid* 40.

traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an integrated policy approach including many of the developmental initiatives undertaken by the State.”¹³⁰

The CSP concept operates through a built-in package of social protection interventions and measures, intimately linked to unemployment protection such as measures to address ‘income poverty’ (provision of a minimum income), measures to address ‘capability poverty’ (provision of certain basic services), measures to address ‘asset poverty’ (income-generating assets) and measures to address ‘special needs’ (e.g. disability or child support).¹³¹ The advantage of this ‘package approach’ is that it “enables one to achieve a degree of balance between measures focused on reducing income, services (capability) and assets poverty.”¹³²

2. THEORETICAL FRAMEWORK

2.1. Unemployment protection

The concept ‘unemployment protection’ in this study refers to a variety of measures and responses aimed at, *inter alia*, cushioning the effect of unemployment on unemployed persons such as the unemployment insurance benefits, unemployment assistance and the citizenship income grants.¹³³ ‘Employment protection’, on the other hand, generally refers to a wide array of measures and policies that are aimed at ensuring continued employment of employed persons such as the procedures to be followed prior to a dismissal.

¹³⁰ *Ibid* 41.

¹³¹ *Ibid* 42.

¹³² *Ibid* 41.

¹³³ See Ebsen I “Unemployment protection from a comparative perspective” Paper presented at a Conference on the Integration of Labour and Social Security Law in the SADC-Region, Frankfurt/Main, Germany, 29-30 June, 2005.

2.1.1. The need to reinvent unemployment protection schemes

Unemployment protection needs in the 21st century are not what they used to be. So are the views of the society on what amounts to unemployment as well as what should be regarded as employment and the responses thereto. Based on the dictates of globalisation and the information age¹³⁴ and other societal changes that economies and societies have to contend with, unemployment protection schemes are bound to undergo a serious and continuous process of change. As observed by Blanpain:

“The most fundamental questions relating to employment involve, of course, the sort of employment that will exist in the future, especially since it may well turn out that the rules developed to monitor employment relations of yesterday and today are entirely inappropriate for tomorrow’s world of work. It is obvious that tremendous changes are taking place in the labour market. Increasing numbers of people are joining the ranks of the unemployed, old jobs are eliminated, new ones created and some observers go so far as to predict the end of work as we have known it. Also from the more general

¹³⁴ See, for example, Scharpf FW “Globalization and the welfare state: Constraints, challenges and vulnerabilities” in Sigg R and Behrendt C (eds) *Social Security in the Global Village* (Transaction (2002)) 85, Plath H *Work Requirements in Transformation, Competence for the Future: A Critical Look at the Consequences of Current Positions* (IAB Labour Market Research Topics No. 45 (2001)), Rubery J and Grimshaw D “ICTs and employment: The problem of job quality” (2001) 140 *International Labour Review* 165, International Labour Office *World Employment Report 2001: Life at Work in the Information Economy* (International Labour Office (2001)), Appelbaum E “Transformation of work and employment and new insecurities” Paper presented at a Conference on the Future of Work, Employment and Social Protection, Annecy, 18-19 January 2001, Blanpain R “The world of work” (2000) 1 *Global Labour e-Journal* – accessed at <http://www.globallabourlaw.com/htm/ejournal/issue1.html>, Standing G *Globalisation and Flexibility: Dancing Around Pensions* (International Labour Office (2000)), Eatwell J “Unemployment: National policies in a global economy” (2000) 21 *International Journal of Manpower* 343, Lyon D “The changing meaning and value of work in a globalized information society” in Archer MS (ed) *Towards Reducing Unemployment: The Proceedings of the Fifth Plenary Session of the Pontifical Academy of Social Sciences 3-6 March 1999* (Pontifical Academy of Social Sciences (1999)) 269, Zamagni S “The Significance of Labour in a Post-industrial Society: Unemployment and the Role of the Civil Economy” in Archer MS (ed) *Towards Reducing Unemployment: The Proceedings of the Fifth Plenary Session of the Pontifical Academy of Social Sciences 3-6 March 1999* (Pontifical Academy of Social Sciences (1999)) 89 at 90, Blanpain R “The world of work and industrial relations in developed market economies of the XXIst century: The age of the creative portfolio worker” in Blanpain R (ed) *Non-standard Work and Industrial Relations* (Kluwer (1999)) 3, Sugeno K and Suwa Y “Technological innovation and social protection: ‘Career is property’ as a concept of labour market policies” in Engels C and Weiss M (eds) *Labour Law and Industrial Relations at the Turn of the Century* (Kluwer (1998)) 6, International Labour Office *World Employment Report 1998 – 1999* (International Labour Office (1998)) 33-55, Gual J “The employment debate: Employment performance and institutional change” in Gual J (ed) *Job Creation: The Role of Labor Market Institutions* (Edward Elgar (1998)) 1, Betancur B “The present and future of work” in Acher M and Malinvaud E (eds) *The Future of Labour and Labour in the Future: Proceedings – Second Plenary Session of the Pontifical Academy of Social Sciences 20-23 March 1996* (Pontifical Academy of Social Sciences (1998)) 113, Lee E “Globalization and employment: Is anxiety justified?” (1996) 136 *International Labour Review* 485 and Freeman C *et al* “Diffusion and the employment effects of information and communication technology” (1995) 134 *International Labour Review* 587.

societal point of view, work and unemployment are among the paramount challenges facing society. For the majority of citizens, work represents the best path to a meaningful way of life. It affords them access to the market of goods and services, offers the possibility of making a positive contribution to their own family and society at large and enriches human contacts. It contributes to the development of the human person and to objective and subjective culture. In this view of things unemployment comes to represent marginalisation and exclusion. Indeed, work is a question of human dignity.¹³⁵

The need for the reinvention of unemployment protection schemes is equally strong for developing countries, such as South Africa, due to the inadequate protection they offer. South Africa's unemployment protection scheme may – on account of the fact that it only provides for an unemployment insurance scheme characterised by low replacement rates of benefits, short duration of benefit payment and limited scope of coverage¹³⁶ – be classified as that of a growing type of unemployment protection scheme.¹³⁷

2.1.2. Six main means of improving an unemployed person's economic security¹³⁸

2.1.2.1. Unemployment insurance benefits

Unemployment insurance (UI) benefits,¹³⁹ which are generally higher than unemployment assistance (UA) benefits, offer a first line of defence to those who are covered. For an unemployed person to reap these benefits he or she must have been in contributory employment and also comply with other qualifying conditions or requirements. Contributions

¹³⁵ Blanpain R “The world of work and industrial relations in developed market economies of the XXIst century: The age of the creative portfolio worker” in Blanpain R (ed) *Non-standard Work and Industrial Relations* (Kluwer 1999) 3 at 3.

¹³⁶ See paragraph 2.2.2. in chapter 3.

¹³⁷ See, for different types of unemployment protection schemes, Schömann K *et al Moving towards Employment Insurance – Unemployment Insurance and Employment Protection in the OECD* (Discussion Paper no. FS I 00-201 Wissenschaftszentrum Berlin für Sozialforschung (2000)) 8-24.

¹³⁸ Standing G *Unemployment and Income Security* (ILO (2000)) 5.

¹³⁹ These are benefits paid under unemployment insurance schemes. Unemployment insurance schemes can either be compulsory or voluntary. Compulsory unemployment insurance schemes, which are mandatory state schemes, vary. They may operate as separate entities or may be co-ordinated or integrated with a much wider social insurance structure (ILO *Social Security for the Unemployed* (ILO (1976)) 3). Voluntary unemployment insurance schemes, on the other hand, generally comprise of trade union unemployment funds that may be supported by state subsidies (ILO *Social Security for the Unemployed* (ILO (1976)) 3): “Voluntary insurance systems are limited to industries in which [labour] unions have established unemployment funds. Membership of these funds is usually compulsory for union members in a covered industry and may be open on a voluntary basis to non-union employees” (Tzannatos Z and Roddis S *Unemployment Benefits* (World Bank (1998)) 8).

from the insured person (and the employer),¹⁴⁰ together with other qualifying conditions,¹⁴¹ determine an unemployed person's eligibility to unemployment insurance benefits.

2.1.2.2. Unemployment assistance

Unemployment assistance (UA) refers to means-tested and/or asset-tested support which is provided to unemployed persons by the state. This form of assistance, financed from the general government revenue, normally kicks in immediately after an unemployed person has exhausted his/her unemployment insurance benefits. Unemployment assistance is completely different to unemployment insurance benefits:

“Unemployment Insurance (UI) and Unemployment Assistance (UA) have primary objectives that are fundamentally different. Payments of UI benefits are intended to smooth income by replacing a portion of an eligible worker's lost wages attributable to unemployment. Payments of UA benefits are intended to eliminate or reduce poverty among low income families when unemployment occurs. Thus while both make payments occasioned by unemployment, UI goes to persons as a matter of right while UA is paid...only to [unemployed persons] whose income and assets fall below designed thresholds specified by a means test...From a macro perspective, UI and UA both make cash payments that respond strongly to cyclical developments. Both undertake activities of payments administration, e.g., decisions about eligibility and payment levels, and these activities are often similar. Internationally, UI is by far the more common of the two.”¹⁴²

2.1.2.3. Labour market policy

There are two interesting policy instruments which, *inter alia*, appear to be popular among policy-makers when it comes to labour market policy. These policy instruments are passive and active labour market policies. These policies are crucial since they “enable a direct impact to be made on the labour market, as they allow for job search and job matches, supply

¹⁴⁰ It should be borne in mind that the state normally takes care of any deficits. This is true of the South African unemployment insurance scheme.

¹⁴¹ Unemployed persons have to prove, among others, that they have been actively searching for a job. See, generally, Spiezia V “The effects of benefits on unemployment and wages: A comparison of unemployment compensation systems” (2000) 139 *International Labour Review* 73 at 79.

¹⁴² Vroman W *Unemployment Insurance and Unemployment Assistance: A Comparison* (World Bank – Social Protection Discussion paper Series No. 0203 (2002)) 1-2.

enhancement and reduction, and the creation of additional jobs, while generally providing replacement income.”¹⁴³

(a) Passive labour market policies

Passive labour market policies, which are widespread in South Africa’s labour market policies, can be described as labour market policies in terms of which “the claimants [of unemployment benefits] are in general required not to be involved in any activity, neither employed nor in an active measure – but available and actively searching for work.”¹⁴⁴ Passive policies stand accused of perpetuating poverty, eroding the work ethic and disrupting flexible work patterns.¹⁴⁵

(b) Active labour market policies

Active labour market policies (sometimes referred to as activation policies), which are widespread in many European countries and wanting in South Africa, unlike passive labour market policies, “always require those receiving benefits to participate in either work or training activities.”¹⁴⁶ It could be argued that they are premised on the idea that resources should be channelled towards employment promotion and job creation (through, *inter alia*, programmes aimed at job search assistance, job training and wage subsidies¹⁴⁷). This approach deviates from that of promoting the ‘culture of dependency’ by keeping people on benefits. By their nature, activation policies are generally concerned about the improvement of the jobseeker’s chances of (re)entering the labour market. They, therefore, strive for labour

¹⁴³ Auer P *Employment Revival in Europe: Labour Market Success in Austria, Denmark, Ireland and the Netherlands* (ILO (2000)) 67.

¹⁴⁴ *Ibid.*

¹⁴⁵ Theodore N and Peck J “Welfare-to-work: National problems, local solutions?” (1999) 19 *Critical Social Policy* 485 at 485.

¹⁴⁶ Auer P *Employment Revival in Europe: Labour Market Success in Austria, Denmark, Ireland and the Netherlands* (ILO (2000)) 67.

¹⁴⁷ See, for example, Fraser N “How strong is the case for targeting active labour market policies?: A review of efficiency and equity arguments” (1999) 20 *International Journal of Manpower* 151, Ho LS “Wage subsidies as a labour market policy tool” (2000) 33 *Policy Sciences* 89 and Walwei U and Werner H “Employment problems and active labor market policies in industrialized countries” in Hoskins DD *et al* (eds) *Social Security at the Dawn of the 21st Century* (Transaction (2001)) 133 at 165.

market inclusion through increased labour market participation. This is apparent from the active policy programmes and measures.¹⁴⁸ As Van Aerschot remarks:

“Activation policies usually comprise a set of measures intended to improve the unemployed jobseeker’s qualifications, skills and motivation on the one hand, and at removing legislative and organizational obstacles to participation in the labour market on the other. Such measures include the organisation of job seeking courses, vocational training and training programmes designed to familiarize the unemployed with new technology. According to the activation ideology, jobseeking is more personalized and systematic than before. The role of employment authorities is to offer a variety of arrangements facilitating entering the labour market, to monitor the behaviour of the jobseeker and to penalize him if he fails to fulfil his obligations. These policies also try to eliminate disincentives to joining the labour market, such as combinations of taxation and social security provisions which in some cases make it more remunerative to live exclusively on social security benefits than to work for one’s living.”¹⁴⁹

2.1.2.4. Workfare

‘Workfare’, which literally means ‘work for your welfare’ and sometimes referred to as ‘work for welfare’ started in the United States of America.¹⁵⁰ Workfare programmes, according to Kildal, “oblige able-bodied recipients to work in return for their benefits on terms inferior to comparative work in the labour market, and are essentially linked to the lowest tier of public income maintenance systems.”¹⁵¹ Whether workfare is an appropriate policy alternative for South Africa’s burgeoning unemployment problem is difficult to tell. The Committee has recently dealt with this question. According to the Committee:

“Research evidence on workfare in advanced economies suggests that although it has had some success in moving welfare recipients off welfare rolls, it also displaces existing workers, undermines wages and fails to create sustainable employment opportunities for beneficiaries. Under certain conditions, workfare can contribute to an intensification of poverty and undermine economic growth. In the South African context, workfare is even less likely to be successful. Whether or not workfare is

¹⁴⁸ E.g. workfare. See paragraph 2.2.4.4. below.

¹⁴⁹ Van Aerschot P “Activation policies and legal safeguards: The case of Finland” in Pieters D (ed) *Confidence and Changes: Managing Social Protection in the New Millennium* (Kluwer (2001)) 27 at 32-33.

¹⁵⁰ Kildal N *Welfare Tendencies in Scandinavian Welfare Policies* (ILO (2001)) 3.

¹⁵¹ *Ibid.*

a useful programme for dealing with unemployment shocks is a contentious issue. Its usefulness in the context of widespread structural unemployment and disproportionately rural female poverty, however, is unambiguously limited.”¹⁵²

The Committee’s stance on workfare alerts unemployment protection systems (re)designers to two crucial issues. Firstly, it makes them wary of the fact that what works for country **A** doesn’t necessarily mean that it will work for country **B**. This is accentuated by the fact that varying socio-economic situations found in different countries need to be taken into account before any attempts are made to transplant unemployment protection policies from one system to another. In addition, the Committee’s verdict that,

“Comparing the policy alternatives, the Committee is of the view that the cost of a South African workfare programme that accommodates half of the officially unemployed would cost roughly the same as the net cost of a universal basic income grant. Such a workfare programme would also fail to reach those in greatest need. Moreover, analysis on the potential impact shows that a workfare-based social safety net fails to protect child-headed households, ‘skip generation’ households (pensioner households with children), and households with members who are unable to work.”¹⁵³

is, to a certain extent, valid. This is the case, particularly when one notes the fact that unemployment is, based on the official definition of unemployment, hovering at 26,5%.¹⁵⁴ If workfare programmes for this 26,5% were to be financed through (tax-based) government revenues, it would mean that a small number of the population, which is in formal employment, would face a mammoth task of sustaining them.¹⁵⁵

2.1.2.5. Employment or wage transfers

Employment or wage transfers are, as Standing puts it, “a sum or money or tax credit paid either to the worker on being hired or, more typically, to the firm hiring the unemployed.”¹⁵⁶

¹⁵² Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Committee Report No 5: Social Protection: Employment and Unemployment* (Committee of Inquiry into a Comprehensive System of Social Security for South Africa (2002)) 164 – accessed at <http://www.saprn.org.za>.

¹⁵³ *Ibid* 165.

¹⁵⁴ Statistics South Africa *Labour Force Survey: March 2005* (Statistics South Africa (2005)) iii.

¹⁵⁵ The same argument is also applicable to the Basic Income Grant (BIG).

¹⁵⁶ Standing G *Unemployment and Income Security* (ILO (2000)) 5.

These means of improving an unemployed person's economic security, sometimes referred to as wage subsidies,¹⁵⁷ are common in a majority of European countries.¹⁵⁸ They are often used as an incentive for employers to take unemployed persons, especially the so-called 'hard-to-place' kind of unemployed person, into their employment.¹⁵⁹ The so-called 'hard-to-place' unemployed persons¹⁶⁰ fall, in most instances, under the long-term unemployed. The long-term unemployed are the most difficult group of unemployed persons to (re)integrate into the labour market, hence the payment of employment transfers. To illustrate their precarious position, even though it might change with time, some commentators have gone to the extent of equating their condition to that of invalids:

“If the activities of the public employment services fail to produce a result, the person concerned drops into the third category: that of the long-term unemployed for whom there is no reasonable prospect to enter the labour market at reasonable conditions. They are at least provisionally to be considered as unemployable persons. This classification may be of a temporary nature: conditions may change, and the chances of employment of these persons may improve in the future. Their situation is the same, in this respect, as that of invalids.”¹⁶¹

Any unemployment protection system which is serious about integrating the unemployed, particularly the long-term unemployed, is bound to go an extra mile to achieve this purpose. And employment or wage transfers, with their various advantages,¹⁶² are one such means at the disposal of a progressive system.

¹⁵⁷ Wage subsidies are paid to employers or firms taking hard-to-place persons, either as a once off payment upon recruitment, or as an ongoing payment and/or partial or complete exemption of the employer from social security contributions. Erhel C *et al* “Job opportunities for the hard-to-place” in Schmid G *et al* (eds) *International Handbook of Labour Market Policy and Evaluation* (Edward Elgar (1996)) 277 at 283-284. In addition, wage subsidies may take the form of tax cuts (e.g. United States of America).

¹⁵⁸ See, about the German wage subsidy system, Weiss M and Schmidt M “Job creation policies in Germany – The role of labour law, social security law and industrial relations” in Biagi M (ed) *Job Creation and Labour Law* (Kluwer (2000)) 145 at 148-149.

¹⁵⁹ Erhel C *et al* “Job opportunities for the hard-to-place” in Schmid G *et al* (eds) *International Handbook of Labour Market Policy and Evaluation* (Edward Elgar (1996)) 277 at 283.

¹⁶⁰ See, for definitions and characteristics of 'hard-to-place' groups, *ibid* at 281-282.

¹⁶¹ Van Langendonck J “From unemployment to labour market insurance” in Pieters D (ed) *Confidence and Changes: Managing Social Protection in the New Millennium* (Kluwer (2001)) 193 at 203.

¹⁶² Wage subsidies have the ability to, as observed by Ho (Ho LS “Wage subsidies as a labour market policy tool” (2000) 33 *Policy Sciences* 89), serve distributive purposes, reduce the social cost of retrenching long-term workers, ensure a minimum income for workers and increase low income people's incentive to work.

Despite all the advantages of wage transfers, there is one disadvantage which deserves special mention. The success of wage transfers invariably depends on the strength of an unemployment protection system's financial muscle¹⁶³ as well as its enforcement and monitoring mechanism(s) to curb possible fraud.¹⁶⁴ Apart from these reasons, there are other grounds which render wage subsidies objectionable:

“First, a high fiscal burden is incurred in the long run. For instance, one form of the wage subsidy, letting people who are in social welfare retain 50 percent of their wages earned on the market in order to provide an incentive to get out of the unemployment trap, would pertain to a large part of the work force...Second, the sums needed have to be raised by taxes which have detrimental effects elsewhere in the economy. Tax revenues will have to come from [labour] income either as direct payroll taxes or indirectly as value added taxes. Third, trade unions may take the subsidy for granted and behave strategically by raising wages in order to obtain a higher subsidy. Fourth, the subsidy is a political variable that is likely to rise in the political process. Thus, wage subsidies will lead more and more away from the necessary decentralized market-oriented approach.”¹⁶⁵

It is on account of these realities that wage transfers are, in most instances, not viewed as an option by many developing countries. While the value of this position may not be ignored, it nonetheless follows naturally that the long-term benefits outperform the short-term disadvantages of the transfers. This is particularly so when one considers the disadvantages of unemployment. By providing wage transfers, despite the problems outlined above, an unemployment protection system provides a win-win situation for the state,¹⁶⁶ an unemployed person and his/her family,¹⁶⁷ an employer¹⁶⁸ and the society in general.¹⁶⁹

¹⁶³ See, for example, Snower DJ “The simple economics of benefit transfers” in Snower DJ and De La Dehesa G (eds) *Unemployment Policy: Government Options for the Labour Market* (Cambridge (1997)) 163 at 167.

¹⁶⁴ See, about the risk of fraud in wage subsidy schemes, Ho LS “Wage subsidies as a labour market tool” (2000) 33 *Policy Sciences* 89 at 95-96. In addition, wage subsidies pose a threat of creating poverty traps for the reason that “they reduce the incentive for firms and workers to raise productivity and wages above the threshold level.” Saget C “Poverty reduction and decent work in developing countries: Do minimum wages help?” (2001) 140 *International Labour Review* 237 at 245.

¹⁶⁵ Siebert H *How can Europe Solve its Unemployment Problem?* (Kiel Discussion Papers no. 342 (1999)) 11.

¹⁶⁶ The state will emerge a winner in its endeavour in ensuring that its subjects live a dignified life, benefit from increased productivity and increased taxes, and alleviate poverty while reducing the number of those who benefit from social assistance benefits (e.g. unemployment assistance).

¹⁶⁷ An unemployed person is given an opportunity to participate in the labour market – an activity which will, apart from income security, provide him/her with a sense of belonging, self-confidence etc. His/her family will be relieved from the obligation of providing for him/her through informal transfers.

¹⁶⁸ The employer will, *inter alia*, have an opportunity to try-out an employee which it could have otherwise been reluctant to put on probation had there not been wage transfers available. This is true, particularly when

2.1.2.6. Citizenship income grants

Citizenship or basic income grants, which trade under various names in various parts of the universe, are “an unconditional basic income paid as a citizenship right to all, including the unemployed.”¹⁷⁰ There are various types of citizenship income grants. It is, therefore, necessary that the different available types of basic income grants be distinguished. This is crucial as a number of Basic Income Grant (BIG) protagonists (inclusive of those based in South Africa) hardly allude to different available types of citizenship or basic income grants. BIG in the form of a *universal* basic income grant is often presented as *the* one and *the* only form of a citizen or basic income grant. In reality there are various kinds. Hauser distinguishes between three different kinds of BIGs: (a) Universal Basic Income, (b) Partial Basic Income, and (c) Conditional Basic Income.¹⁷¹

one considers the following remark by Phelps: “The dismal wage rates of very disadvantaged workers and acute shortage of jobs have harmful effects on others – external diseconomies. A subsidy or other measure serving to increase the demand for disadvantaged labour in legitimate enterprises, in reversing these effects, would generate external economies. The plight of very disadvantaged workers may spread like a contagion to others, nullifying advantages and worsening disadvantages. A culture quite distant from that of commercial enterprise may develop in which norms of responsibility and self-reliance are not passed along. When parents and older relatives are frequently unemployed, and hence often dependent on welfare, a child is not provided with role models from which to acquire the habits of initiative and responsibility needed for realising his or her potential in legitimate business. Disadvantaged workers lacking access to business enterprises are unable to transmit to their children any knowledge of the ways of the economic mainstream. A drug culture may also develop out of these conditions. Curiously, this effect may be stimulated by the welfare state. To be very disadvantaged in a society rich enough to put up a comfortable safety net means that there is rather little distance between the outcome you can hope for by knocking yourself out and the average expectation for people in your situation; so a sense of powerlessness – little power to do better – must overtake many of the disadvantaged. In any case, drug use is apt to be high in communities heavily populated by the disadvantaged and to spread to those who might not succumb to it or be introduced to it were it not already widespread. (Drug addiction turns some users into suppliers recruiting new addicts to support the addiction.) A culture of criminality may result as well. Then incidents of violence become common. As the bleak prospect of the disadvantaged reduces the value they put on their own lives, it also reduces the value they place on others’ lives as well. It would be surprising if some of the disadvantaged, feeling they were being shown a lack of respect by society, did not seek ‘respect’ through the use of guns.”

¹⁶⁹ The society flourishes when its members are able to take care of themselves and live a dignified life. This is true especially when one considers the fact that it has always been and is still society’s goal to take care of its needy members.

¹⁷⁰ Standing G *Unemployment and Income Security* (ILO (2000)) 5.

¹⁷¹ Hauser R “‘The Universal Basic Income’: Its Contribution to Reducing Unemployment and its Relationship to Catholic Social Teaching on the ‘Family Wage’” in Archer MS (ed) *Towards Reducing Unemployment: The Proceedings of the Fifth Plenary Session of the Pontifical Academy of Social Sciences 3-6 March 1999* (Pontifical Academy of Social Sciences (1999)) 143.

(a) Universal Basic Income

A Universal Basic Income (UBI) is defined as: “a transfer paid by the state to all citizens, from birth to grave, without any preconditions and without regard to other incomes of the beneficiary or his family in order to cover fully the socio-cultural minimum of subsistence.”¹⁷² UBI is akin to the manner in which BIG is referred to in South Africa – more especially by the Committee.¹⁷³ This assertion is informed by the explanation by the Committee about what is meant by BIG. According to the Committee a “Basic Income Grant is provided as an entitlement and without a means test that will more readily reach the poorest population.”¹⁷⁴

(b) Partial Basic Income

A Partial Basic Income (PBI), unlike UBI, “covers only a fraction of the socio-cultural minimum subsistence.”¹⁷⁵

(c) Conditional Basic Income

A Conditional Basic Income (CBI) can be distinguished from the UBI and PBI in the sense that it “amounts to the full socio-cultural minimum of subsistence, but is only paid to certain groups of the population which can be selected by an objective criterion that is simple to check.”¹⁷⁶

¹⁷² *Ibid.*

¹⁷³ See Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa* (Committee of Inquiry into a Comprehensive System of Social Security for South Africa (March 2002)) 60-66.

¹⁷⁴ *Ibid* 61.

¹⁷⁵ Hauser R “‘The Universal Basic Income’: Its Contribution to Reducing Unemployment and its Relationship to Catholic Social Teaching on the ‘Family Wage’” in Archer MS (ed) *Towards Reducing Unemployment: The Proceedings of the Fifth Plenary Session of the Pontifical Academy of Social Sciences 3-6 March 1999* (Pontifical Academy of Social Sciences (1999)) 143.

¹⁷⁶ *Ibid.*

2.2. Unemployment protection and the growing informal economy: Some observations

The economy, just like a coin, has two sides – the informal economy and the formal economy.¹⁷⁷ While this is true of many economies of the world, one needs to distinguish between the developed world and developing world economies. Developed countries, unlike developing countries, have well-built formal economies. Well-built formal economies favour formal employment. The situation in developing countries is quite the opposite:

“...in developing countries in general, different structures of [labour] coexist. In a single place, there may be [labour] models from the 19th, 20th and 21st centuries operating alongside one another, without the adjustment that allows for confidence in a rapid homogenisation that would facilitate a viable policy. Real unemployment levels are high. Collection and reporting of the data that accurately expresses its full scope is hampered by an interested cosmetic cover-up. In effect, countries in deep poverty register less unemployment than countries with more advanced development, without considering that in those countries unemployment is accompanied by subsidies. Unemployment has forced an informal economy to form.”¹⁷⁸

Persons employed in the informal economy are as a rule excluded from formal transfers. Hence, the most important form of protection available to those in the informal economy consists of informal transfers from families, friends and neighbours. In certain instances persons employed in the informal economy come up with their own informal coping arrangements to guard against certain risks. It should be noted, however, that these informal coping strategies (which can at times be community- or kinship-based or mutuality-based) are primarily concerned with the immediate risks or the so-called ‘here and now risks’ and are, as a result, unable to withstand challenges such as, among others, HIV/AIDS¹⁷⁹ and long-term unemployment.

¹⁷⁷ Kolm A and Larsen B “Social norms, the informal sector and unemployment” – accessed at <http://www.cbs.dk/departments/econ/res/wpeco42002.pdf>.

¹⁷⁸ Bentacur B “The present and future of work” in Acher M and Malinvaud E (eds) *The Future of Labour and Labour in the Future: Proceedings – Second Plenary Session of the Pontifical Academy of Social Sciences 20-23 March 1996* (Pontifical Academy of Social Sciences 1998) 113 at 117.

¹⁷⁹ See Dekker AH and Olivier MP “Informal social security” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 559, Dekker A “Social security for those who work informally, and informal (community-and family-based) solutions to social protection” in Olivier MP *et al* (eds) *The Extension*

When the formal economy sheds the labour force in droves, a substantial number of the labour force seeks solace in the informal economy. In developing countries, due to weak and/or non-existent safety nets, poor people find it difficult to survive without employment. As a result this leads to the rise in informal employment.¹⁸⁰ South Africa, as one of the developing countries, serves as a perfect example. A majority of the unemployed South African populace who (a) are discarded by the formal economy, (b) fail to enter the formal labour market and (c) fall through the cracks of the social security safety net often resort to the informal economy and informal social security for protection against social risks.

The formation of, participation in and the growth of the informal economy in South Africa, just as in other parts of the world, are influenced by a variety of factors (e.g. unemployment, poverty and tax evasion). Nevertheless, it is doubtful whether the South African informal economy is exclusively driven by the desire to avoid the tax collector or illicit goals. In addition, for many people who participate in the informal economy, it is not always a matter of choice between participating in the formal or informal economy. Contrary to a common belief held by some commentators, generally speaking, those who participate in the informal economy are not (as a rule) confronted by a ‘sectoral choice’, as suggested by Kolm and Larsen:

“A given worker faces a decision of whether to perform his activities in the formal or the informal sector. When making that decision, the worker compares net payoffs and employment perspectives in the two sectors. Considering this sectoral choice, one question emerges: why do not all workers apply for jobs in either the formal- *or* the informal sector? Why do both sectors exist? One prominent explanation is that workers differ in moral. Entering the informal sector is associated with moral costs. Some workers have higher moral preventing them from performing illegal work. Other workers have

of Social Security Protection in South Africa: A Legal Inquiry (Siber Ink (2001)) 247, Olivier MP and Mpedi LG “Extending social protection to families in the African context: The complementary role of formal and informal social security” Paper presented at the 4th International Research Conference on Social Security, Antwerp (Belgium), 5-7 May 2003 and Olivier MP and Mpedi LG “Accommodating informal social security within social security systems: Observations from a southern African perspective” Paper presented at a conference on Social Values, Social Policies – Normative Foundations of Changing Social Policies in European Countries, Tilburg (Netherlands), 29-31 August 2002.

¹⁸⁰ Bhalla AS and Lapeyre F *Poverty and Exclusion in a Global World* (Macmillan (1999)) 56 and 78.

lower moral and enter the informal sector gladly. The informal sector then consists of low-moral workers and the formal sector consists of high-moral workers.”¹⁸¹

It is, indeed, a matter of survival – particularly when one considers other contributing factors which are widespread in South Africa, such as burgeoning unemployment, rising poverty and inequality, limited scope of coverage of the formal system and an urban-biased labour market. In addition, it is important to note that vulnerable people are attracted by informal activities because of their “relative ease of entry, reliance on local resources, small manageable scale, and minimum capital investment.”¹⁸² What is more, “informal activities of this kind allow disadvantaged individuals or households to maximize what is often their only real asset, their labour power.”¹⁸³

2.3. Employment protection

2.3.1. What is employment protection?

According to Seifert, employment protection or employment security means “the elaboration of strategies that prevent employers from [implementing] redundancies.”¹⁸⁴ While this definition may (to some extent) be helpful, it should be noted that employment protection, which is “one of the central factors in an employment relationship”,¹⁸⁵ goes beyond the prevention of employers from implementing redundancies. Employment protection is all about the “absence of fear of employment loss – that is not having the threat of loss of employment.”¹⁸⁶ With that in mind, it can thus be said that employment protection refers, in general terms, to a wide array of measures and policies that are aimed at ensuring continued employment of employed persons. Even so, employment protection does not necessarily

¹⁸¹ Kolm A and Larsen B “Moral, the informal sector, and unemployment” (2001) – accessed at <http://www.nek.uu.se/Pdf/2001wp9.pdf>.

¹⁸² Chen MA *et al* *Supporting Workers in the Informal Economy: A Policy Framework* (ILO Working Paper on the Informal Economy no. 2002/2 (2002)) 11.

¹⁸³ *Ibid.*

¹⁸⁴ Seifert A “Employment protection and employment promotion as goals of collective bargaining in the Federal Republic of Germany” (1999) 15 *International Journal of Comparative Labour Law and Industrial Relations* 343 at 347.

¹⁸⁵ Walwei U *Flexibility of Employment Relationships: Possibilities and Limits* (IAB Labour Market Research Topics no. 22 (1997)) 5.

¹⁸⁶ Dasgupta S *Employment Security: Conceptual and Statistical Issues* (ILO (2001)) 2.

mean a total proscription of dismissal or unrestricted legal protection against dismissal. As Walwei points out:

“Employment security does not necessarily imply legal protection against dismissal. It is very obvious that certain employees (e.g. in certain small firms) in fact enjoy a high degree of employment security without any formal regulations; legal protection against dismissal, however, does not provide absolute security of employment. It simply means that there is economically viable dismissal protection in place to prevent arbitrary lay-offs. Employers must therefore justify redundancies on objective grounds and respect certain procedures (e.g. giving notice).”¹⁸⁷

In addition to the abovementioned definitions, there is a definition which appears to enjoy wide usage: “...employment security means that workers have protection against arbitrary and short-notice dismissal from employment, as well as having long-term contracts of employment and having employment relations that avoid casualisation.”¹⁸⁸ Notwithstanding the foregoing, the crux of the matter is that “[e]mployment protection encompasses any set of regulations, either legislated or written in [labour] contracts, that limit the employer’s ability to dismiss the worker without delay or costs.”¹⁸⁹

2.3.2. Defining employment protection: A critique

Defining employment protection is not an easy task – so is developing a cutting edge definition that is suitable for different economic and labour market situations. This, it may be opined, explains the proliferation of ‘employment protection’ or ‘employment security’ definitions. However, the importance of employment protection in an unemployment protection system cannot be stressed enough. This is primarily because employment protection is an “important dimension of quality of employment and secure employment is the main means to secure income.”¹⁹⁰ Nevertheless, employment protection stands accused of

¹⁸⁷ Walwei U *Flexibility of Employment Relationships: Possibilities and Limits* (IAB Labour Market Research Topics no. 22 (1997)) 4.

¹⁸⁸ Dasgupta S *Employment Security: Conceptual and Statistical Issues* (ILO (2001)) 2.

¹⁸⁹ Pissarides CA “Employment protection” (2001) 8 *Labour Economics* 131 at 136.

¹⁹⁰ Dasgupta S *Employment Security: Conceptual and Statistical Issues* (ILO (2001)) 2.

protecting those who are employed at the expense of the unemployed masses.¹⁹¹ Even though there are views to the contrary, this implies that employment protection is bad for job creation. The reason often advanced is that it makes employers to be reluctant to employ new employees¹⁹² in view of the difficulties associated with firing employees. This could, it is often argued, lead to the exclusion and marginalisation of vulnerable groups (such as the long-term unemployed and the hard-to-place groups of persons) from the labour market.¹⁹³ Employment protection is, among other reasons, criticised for and/or accused of hindering labour market flexibility because (it is believed that) employment protection laws and practices favour employees above employers by giving them more rights.¹⁹⁴ In addition, it is argued that employment protection promotes inequality.¹⁹⁵

In spite of the foregoing, employment protection remains desirable, particularly when it is being observed from a developing country's perspective. The criticism that employment protection provides more rights to employees presupposes that the relationship between employers and their employees is that of equals. The truth of the matter is that in practice employers wield more power and influence than their employees in as far as the employment relationship is concerned. Therefore dismissal protection is needed. In developing countries, where unemployment (as well as exclusion and marginalisation)¹⁹⁶ levels are very high,

¹⁹¹ Rutkowski J *Does Strict Employment Protection Discourage Job Creation?: Evidence from Croatia* (World Bank Policy Research Working Paper 3104 (2003)) and Lazear EP "Job security provisions and employment" (1990) 105 *Quarterly Journal of Economics* 699 at 699.

¹⁹² See, for example, Bentolila S and Bertola G "Firing costs and labour demand: How bad is Eurosclerosis?" (1990) 57 *Review of Economic Studies* 381,

¹⁹³ A study by Acemoglu and Angrist (Acemoglu D and Angrist J "Consequences of employment protection? The case of the Americans with Disabilities Act" – accessed at <http://econ-www.mit.edu/faculty/angrist/files/jpefnl1.pdf>), for example, maintains to have discovered that the introduction of the *Americans with Disabilities Act* was followed by a drop in the employment of disabled men aged 21-39.

¹⁹⁴ See, for example, Abraham KG and Houseman SN *Does Employment Protection Inhibit Labor Market Flexibility?: Lessons from Germany, France and Belgium* (Upjohn Institute Staff Working Paper 93-16 (1993)).

¹⁹⁵ Heckman JJ and Pagés C *The Cost of Job Security Regulation: Evidence from Latin American Labour Markets* (NBER Research Working Paper 3104 (2003)).

¹⁹⁶ See, for example, Ghai D *Social Security Priorities and Patterns: A Global Perspective* (Institute for Labour Studies Discussion Paper DP/141/2002 (2002)), ILO *Decent Work and the Informal Economy* (ILO (2002)), Canagarajah S and Sethuraman SV *Social Protection and the Informal Sector in Developing Countries: Challenges and Opportunities* (World Bank Social Protection Discussion Paper Series no. 0130 (2001)), Beattie R "Social protection for all: But how?" (2000) 139 *International Labour Review* 129 at 129-133, Bhalla AS and Lapeyre F *Poverty and Exclusion in a Global World* (Macmillan (1999)) 131-165, Gore C *Social Exclusion and Africa South of the Sahara: A Review of Literature* (Labour Institutions and Development Programme DP/62/1994 (1994)), Burgess R and Stern N "Social security in developing countries: What, why, who and how?" in Ahmad E *et al* (eds) *Social Security in Developing Countries* (Claredon (1991)) 40 and Turnham D

supply exceeds demand. This means that very often it is a jobseeker or an employee who needs an employer and not the other way round. Another crucial point is that most developing countries are reeling from a disastrous history of colonialism and imperialism which paved a way for human misfortunes such as civil wars and apartheid.¹⁹⁷ The point to be observed is that at some stage in the history of most developing countries there were gross violations of employees' employment (and other fundamental) rights. Employment protection is put in place to prevent employers from violating the employment rights of their employees and, in certain instances, those of jobseekers.¹⁹⁸ It is on account of these realities that employment protection remains important, for it secures one's – at times – only source of livelihood. The bottom line is that "in developing countries where effective social insurance systems do not exist, the poor have to work in order to support themselves and their families."¹⁹⁹

and Eröcal D *Unemployment in Developing Countries: New Light on an Old Problem* (OECD Development Centre Technical Papers no. 22 (1990)).

¹⁹⁷ See, generally, Shivji IG "Law's empire and empire's lawlessness: Beyond the Anglo-America law" (2003) 1 *Law, Social Justice & Global Development Journal* – <http://elj.warwick.ac.uk/global/issue/2003-1/shivji.html>, Ndulo M "Constitution-making in Africa: Assessing both the process and the content" (2001) 21 *Public Administration and Development* 101, Aliber M "Chronic poverty in South Africa: Incidences, causes and policies" (2003) 31 *World Development* 473 at 474-475.

¹⁹⁸ For example, the Constitution of the Republic of South Africa, which provides every person with the right to fair labour practices (s 23 of the Constitution), states in its preamble the following: "We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to – Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations. May God protect our people." It goes without saying that it is because of the unpleasant past practices that the drafters deemed it fit to include such a preamble and also entrench the right to fair labour practices in the Bill of Rights. See Olivier M "Constitutional perspectives on the enforcement of socio-economic rights: Recent South African experiences" (2002) 33 *Victoria University of Wellington Law Review* 117 at 117. Also see *S v Makwanyane* (1995 3 SA 391 (CC); 1995 6 BCLR 665 (CC)) where the Constitutional Court remarked that "the Constitution ... provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex." For this reason, it does not come as a surprise that employment protection laws (such as the unfair dismissal and unfair labour practice provisions contained in Chapter 8 of the *Labour Relations Act* 66 of 1995) were enacted to give effect to the provisions of s 23 of the Constitution.

¹⁹⁹ Majid N "The working poor in developing countries" (2001) 140 *International Labour Review* 271 at 271.

2.3.3. Types of employment protection

Employment protection is all about rules and regulations, which may be in the form of legislation or embodied in labour contracts such as a contract of employment or collective agreements which limit the employer's freedom to dismiss an employee without reason, delay or cost.²⁰⁰ There are several kinds of employment protection and they include, among others, the following: administrative procedures, notice of termination, severance payment, curb on dismissal, and additional measures for collective dismissals.²⁰¹

2.3.3.1. Administrative procedures²⁰²

These are the procedures to be followed prior to a dismissal. An employer who desires to dismiss an employee, irrespective of the presence of a valid reason for the envisaged step, is required to follow certain procedural steps. The goal is to satisfy the procedural fairness of a dismissal.²⁰³ The employer must, for example, provide an employee with an opportunity to defend him- or herself. Disciplinary hearings may, in dismissal matters involving misconduct, be cited as a platform from which an employee may defend him- or herself. In cases of dismissal on the ground of incapacity (dismissal due to poor work performance), an employer is required to consult with and afford the affected employee with an opportunity to improve.²⁰⁴ Employers are, in the event of dismissals on the basis of operational requirements, *inter alia*, required to consult workers (or workers representatives)²⁰⁵ and to (in certain jurisdictions such as Germany) notify a public authority.

²⁰⁰ Pissarides CA "Employment protection" (2001) 8 *Labour Economics* 131 at 136.

²⁰¹ *Ibid.*

²⁰² See, for further reading about the situation in South Africa, paragraph 3.1. in chapter 3.

²⁰³ See s 188 of the *Labour Relations Act* (LRA) and item 4(1) of the *Code of Good Practice: Dismissal* (Schedule 8 of the LRA)). Also see Grogan J *Workplace Law* (8th ed) (Juta (2005)) 188-206.

²⁰⁴ See item 8 of the *Code of Good Practice: Dismissal*. Also see Grogan J *Workplace Law* (8th ed) (Juta (2005)) 208-215.

²⁰⁵ See 189(1) of the LRA and Grogan J *Workplace Law* (8th ed) (Juta (2005)) 229-232.

2.3.3.2. Notice of termination²⁰⁶

This is in most instances embodied in legislation, employment contracts or even in employment policies of an employer. This is a period which is given by one of the parties to an employment contract prior to the termination of an employment contract. The notice of termination, under normal circumstances and depending on the required notice period, is geared at the elimination of the element of surprise during the termination of employment contracts. That is why notice of termination normally involves a waiting period – even though the length of the notice period may vary from one employer to another or one employment contract to another. This is a period “during which the notice is issued but does not become effective.”²⁰⁷ It should be noted, however, that an employer might pay an employee his or her remuneration instead of notice.²⁰⁸

2.3.3.3. Severance payment²⁰⁹

Sometimes referred to as redundancy payment or (in a casual manner as) retrenchment package, severance payment is an amount of money which is paid to redundant employees as an indemnity for dismissal.²¹⁰ The amount payable, however, often depends on past earnings and the length of service.²¹¹ The cost of redundancy payment is in most instances born by “employers, either individually or with the assistance of a special fund to which employers as a whole contribute.”²¹²

2.3.3.4. Curb on dismissal

This kind of employment protection, as Pissarides puts it, “includes mainly the possibility of a challenge by the employee for “unfair dismissal” and the leniency with which the law and

²⁰⁶ See, as regards notice of termination in South Africa, paragraph 3.1.1. in chapter 3.

²⁰⁷ Pissarides CA “Employment protection” (2001) 8 *Labour Economics* 131 at 136.

²⁰⁸ See s 38 of the BCEA.

²⁰⁹ See, as regards severance payment in South Africa, paragraph 3.2. in chapter 3.

²¹⁰ See Grogan J *Workplace Law* (8th ed) (Juta (2005)) 232 and 237.

²¹¹ ILO *Social Security for the Unemployed* (ILO (1976)) 27.

²¹² *Ibid.*

courts in different countries deal with such appeals”.²¹³ Generally there are three internationally recognised grounds upon which an employer may dismiss an employee,²¹⁴ namely dismissal for misconduct, dismissal for incapacity and dismissal for operational requirements.²¹⁵ A distinction is often made between lawful dismissals, unfair dismissals²¹⁶ and automatically unfair dismissals.²¹⁷

2.3.3.5. Additional measures for collective dismissals

Certain countries, in addition to normal responsibilities, require employers to comply with several additional obligations when they plan to retrench employees.²¹⁸

3. SUMMARY

3.1. Introduction

In this chapter, a conceptual and theoretical framework within which an unemployment protection system operates has been set out. It attempted to highlight the often ignored and different conditions that exist in developed and developing countries. These differences underscore an important principle, namely that concepts and theories which function well in developed countries are not always similarly relevant for developing countries. Notwithstanding the foregoing, this chapter pointed out challenges which face unemployment protection systems throughout the world (such as globalisation), as well as those that are peculiar to developing countries (such as declining formal employment as well as the rise in informal activities, which exclude and marginalise many people from

²¹³ Pissarides CA “Employment protection” (2001) 8 *Labour Economics* 131 at 136.

²¹⁴ See the *Termination of Employment Convention* 158 of 1982. Also see paragraph 1.2.3.2. in chapter 4.

²¹⁵ See s 188(1)(a) of the LRA and Grogan J *Workplace Law* (8th ed) (Juta (2005)) 155-243.

²¹⁶ See s 188 of the LRA and Grogan J *Workplace Law* (8th ed) (Juta (2005)) 155-243.

²¹⁷ See s 187 of the LRA and Grogan J *Workplace Law* (8th ed) (Juta (2005)) 137-154

²¹⁸ See, for example, Morin M and Vicens C “Redundancy, business flexibility and worker’s security: Findings of a comparative European survey” (2001) 140 *International Labour Review* 45 and Young D *Employment Protection Legislation: Its Economic Impact and the Case for Reform* (European Commission – Directorate for Economic and Financial Affairs (2003)) 21-28. See, as regards additional measures for collective dismissals in South Africa, paragraph 3.1.2. in chapter 3.

unemployment protection systems). Key issues and findings (conclusions) arising from the discussion of the conceptual and theoretical framework are summarised below.

3.2. Conceptual framework

3.2.1. Concept of unemployment

While it is acknowledged that the definition of unemployment varies from one area of study to another, it nonetheless follows that it is often couched in narrow terms. This results in exclusions and marginalisation of certain groups and categories of persons (particularly in developing countries such as South Africa). People who are engaged in care work and informal economy activity, for example, are the usual victims of the effects of this narrow approach.

3.2.2. Social exclusion in unemployment protection systems

Despite the importance of an unemployment protection system as a tool to curb or minimise social exclusion, many unemployment protection systems (particularly those in developing countries) are yet to come to grips with the prevention of the exclusion and marginalisation of certain categories of persons. The main problem as it is argued in this chapter is that they pay too much attention to the replacement of income with little regard to the (re)integration of the unemployed into the labour market. In addition, they concern themselves only with those who are in the labour market. The effect of this approach is that those who find it difficult to secure a berth in the labour market due to age (foreign and native youth, and the aged), gender (single or married females of a child-bearing age) and disability (people living with disabilities) are left at the mercy of unemployment and other unemployment-related hardships (such as poverty).

Attempts to combat social exclusion require a variety of policy interventions which should, *inter alia*, include labour market interventions, employability interventions and social

protection interventions (to cater for the social protection needs of the socially excluded through, *inter alia*, social insurance, social assistance and social integration).

3.3. Theoretical framework

3.3.1. The need to redesign unemployment protection systems

Changing societal views on what amounts to unemployment as well as what should be regarded as employment and the dictates of the information age require unemployment protection systems to undergo a serious and continuous process of change if they are to provide full employment protection. The need to redesign unemployment protection systems is even stronger when it comes to developing countries, such as South Africa, due to the limited scope of protection they offer.

3.3.2. Improving the economic security of unemployed persons

There are a variety of means of improving the economic security of unemployed persons. They include, *inter alia*, the following: unemployment insurance benefits, unemployment assistance, labour market policy, workfare, employment or wage transfers, and citizenship income grants.²¹⁹ While some of the foregoing means of improving the economic security of unemployed persons may be found in developing and developed countries,²²⁰ many are yet to be implemented in developing countries. The reluctance of many developing countries to experiment with some of these means is fairly understandable. Firstly, what works for country **A** does not mean that it will work for country **B**. Secondly, varying socio-economic situations found in different countries need to be taken into account before any attempts are made to transplant unemployment protection policies from one system to another.

²¹⁹ Standing G *Unemployment and Income Security* (ILO (2000)) 5.

²²⁰ Unemployment insurance benefits are a common example.

3.3.3. Growing informal economy as a challenge to unemployment protection

The growing informal economy and the changing nature of work prove to be some of those major challenges facing unemployment protection systems. The problem with the informal economy is that it provides little social protection to those who participate in it as well as their families.

3.3.4. Importance of employment protection

Employment protection is, among other reasons, criticised for and/or accused of hindering labour market flexibility because (it is believed that) employment protection laws and practices favour employees above employers by giving them more rights. In addition, it is argued that employment protection promotes inequality. In spite of the foregoing, employment protection remains desirable, particularly when it is being observed from a developing country's perspective. The criticism that employment protection provides more rights to employees presupposes that the relationship between employers and their employees is that of equals. The truth of the matter is that in practice employers wield more power and influence than their employees in as far as the employment relationship is concerned. In developing countries, where unemployment (as well as exclusion and marginalisation) levels are very high, supply exceeds demand. This means that very often it is a jobseeker or an employee who needs an employer and not the other way round. Another crucial point is that most developing countries are reeling from a disastrous history of colonialism and imperialism which paved a way for human misfortunes such as civil wars and apartheid.²²¹ The point to be observed is that at some stage in the history of most developing countries there were gross violations of employees' employment (and other fundamental) rights. Employment protection is put in place to prevent employers from violating the employment rights of their employees and, in certain instances, those of jobseekers. It is on account of

²²¹ See, generally, Shivji IG "Law's empire and empire's lawlessness: Beyond the Anglo-America law" (2003) 1 *Law, Social Justice & Global Development Journal* – <http://elj.warwick.ac.uk/global/issue/2003-1/shivji.html>, Ndulo M "Constitution-making in Africa: Assessing both the process and the content" (2001) 21 *Public Administration and Development* 101, Aliber M "Chronic poverty in South Africa: Incidences, causes and policies" (2003) 31 *World Development* 473 at 474-475.

these realities that employment protection remains important for it secures one's – at times – only source of livelihood.

CHAPTER 3

UNEMPLOYMENT PROTECTION IN SOUTH AFRICA

“Let there be work, bread, water and salt for all” – Nelson Mandela²²²

1. CONSTITUTIONAL BACKGROUND

1.1. Introduction

The adoption of the South African Constitution (hereafter the Constitution)²²³ signalled an end to an era which was characterised by little and/or no respect for human rights.²²⁴ With it came a host of (socio-economic) rights and duties which signified the dawn of a new era.²²⁵ The Constitution is the supreme law²²⁶ of the country and any law or conduct inconsistent

²²² Mandela N “Inauguration speech” 10 May 1994 (Union Buildings, Pretoria (South Africa)).

²²³ Act 108 of 1996. This Constitution, often referred to as the Final Constitution, replaced the Interim Constitution (Act 200 of 1993).

²²⁴ See, generally, Henrard K “Post apartheid South Africa’s democratic transformation process: Redress of the past, reconciliation and ‘unity in diversity’” (2002) 1 *Global Review of Ethnopolitics* 18, Skovsholm K “The right to vote in South Africa – A hundred years of experience” (1999) 32 *Verfassung und Recht Übersee* 236 at 237-243 and Werle G “Without truth, no reconciliation: The South African *Rechtsstaat* and the Apartheid past” (1996) 29 *Verfassung und Recht Übersee* 58.

²²⁵ See, for an illuminating discussion on the process towards the transition to constitutionalism in South Africa, Malherbe R “A new beginning: Introducing the South African Constitution and Bill of Rights” (2000) 1 *Netherlands Quarterly of Human Rights* 45, Du Plessis L “Freedom of or freedom from religion? An overview of issues pertinent to the constitutional protection of religious rights and freedom in “the new South Africa”” (2001) 2 *Brigham Young University Law Review* 437 at 438-439, Skovsholm K “The right to vote in South Africa – A hundred years of experience” (1999) 32 *Verfassung und Recht Übersee* 236 at 245-252, Cockrell A “The South African Bill of Rights and the ‘Duck/Rabbit’” (1997) 69 *Modern Law Review* 513, Klug H “South Africa’s new constitution: The challenges of diversity and identity” (1995) 28 *Verfassung und Recht Übersee* 421, Klug H “Co-operative government in South Africa’s post-apartheid constitutions: Embracing the German model?” (2000) 33 *Verfassung und Recht Übersee* 432, Sarkin J “The development of the human rights culture in South Africa” (1998) 20 *Human Rights Quarterly* 628 and Corder H “Towards a South African Constitution” (1994) 57 *Modern Law Review* 491.

²²⁶ See, for further reading, about the notion of constitutional supremacy, Limbach J “The concept of the supremacy of the constitution” (2001) 64 *Modern Law Review* 1. By adopting constitutional supremacy, South Africa broke away from the parliamentary sovereignty system. In accordance with the parliamentary sovereignty doctrine, the South African parliament was at liberty to enact any law(s) it deemed fit. See, for further reading, about the concept of parliamentary sovereignty, Cowen DV “Legislature and judiciary: Reflections on the constitutional issues in South Africa (Part I)” (1952) 15 *Modern Law Review* 282, Cowen DV “Legislature and judiciary: Reflections on the constitutional issues in South Africa (Part II)” (1953) 16 *Modern Law Review* 273 and Gray HR “The sovereignty of parliament today” (1953) 10 *University of Toronto Law Journal* 54.

with it is invalid.²²⁷ In addition, the rights entrenched in the Bill of Rights²²⁸ applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.²²⁹ The rights contained in the Constitution, coupled with the obligations they impose on a variety of role-players, which include both natural and juristic persons,²³⁰ have (as shown below) far-reaching implications for the South African unemployment protection system as it is at the moment.²³¹

1.2. Human right to work

1.2.1. Introduction

Is the right to work an implicit part of socio-economic rights²³² which are entrenched in the Bill of Rights? If that is the case – does it mean, therefore, that citizens can demand employment from the state? Not necessarily, at least as far as the South African Constitution is concerned²³³ – even though the right to work in its strictest sense can leave one with an impression that it envisages a situation where individuals can knock on government's door and demand employment.²³⁴ The issue involved here is that “a guarantee of the right to work would seem to imply that the State should provide a job to every person who is available for,

²²⁷ See the preamble, s 1(c) and s 2 of the Constitution.

²²⁸ Chapter 2 of the Constitution.

²²⁹ S 8(1) of the Constitution. According to s 239 of the Constitution, an ‘organ of state’ means “(a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution – (i) exercising a power or performing a function in terms of the Constitution or a provincial Constitution; (ii) or exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.”

²³⁰ In terms of 8(2) of the Constitution “a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”

²³¹ See paragraphs 1.2. and 1.3. below.

²³² Socio-economic rights entrenched in the Constitution include, among others, the following: the right of access to housing (s 26 of the Constitution), the right of access to health care (s 27(1)(a) of the Constitution), the right of access to sufficient food and water (s 27(1)(b) of the Constitution), and the right to basic education (s 29 of the Constitution).

²³³ Steenkamp AJ “The South African Constitution of 1993 and the Bill of Rights: An evaluation in light of the international human rights norms” (1995) 17 *Human Rights Quarterly* 101 at 115-116.

²³⁴ See, for example, Drewicki K “The right to work and rights in work” in Eide A *et al* (eds) *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff (1995)) 169 at 181-182. Also see, generally, Glendon MA “The right to work and the limits of law” in Archer M and Malinvaud E (eds) *The Right to Work: Towards Full Employment* (Pontifical Academy of Social Sciences (1998)) 103 at 103-111.

and willing to, work.”²³⁵ The right to work in its broader sense is a right which embodies a variety of rights which are essential for an individual who is engaged, should be engaged or about to be engaged in work.²³⁶ It incorporates rights such as the right not to be subjected to forced or compulsory labour, freedom to work, right to free employment services, right to protection of employment and right to protection against unemployment.²³⁷

There appears to be a link between the human right to work, the rights entrenched in the Bill of Rights (such as the right of access to housing, the right of access to health care, the right of access to sufficient food and water, and the right to basic education, as well as the objectives and values of the Constitution.²³⁸ Without work and/or access to social security the aforementioned rights, it is opined, are as good as being absent. This is mainly because without income (which is often, if not in most instances, generated through work) it is difficult if not impossible to enjoy the abovementioned rights to the fullest.²³⁹ The foregoing assertion does not, however, presuppose that labour income guarantees full enjoyment of the abovementioned basic rights.²⁴⁰ It is, however, common knowledge that those with (labour) income are better off compared to those with nothing at all. As pointed out by Burgess and Mitchell:²⁴¹

²³⁵ Craven MCR *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon (1995)) at 204.

²³⁶ Craven (Craven MCR *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon (1995)) at 205) submits that: “A right to work in a broader sense seems to encompass two general areas of concern: a right to enter employment and a right not to be unjustly deprived of work. As far as the former is concerned, it includes all matters that affect access to work such as levels of unemployment, equality of opportunity, vocational guidance and training, and education. The latter field on the other hand concerns employment security and in particular security against dismissal.”

²³⁷ See Drewicki K “The right to work and rights in work” in Eide A *et al* (eds) *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff (1995)) 169 at 175-185.

²³⁸ See, for the objectives and values of the Constitution, the preamble and s 1 of the Constitution.

²³⁹ As pointed out by Craven (Craven MCR *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon (1995)) at 194): “Despite the statistical existence of unemployment in every country in the world, work continues to be ‘an essential part of the human condition’. For many, it represents the primary source of income upon which their physical survival depends. Not only is it crucial to the enjoyment of ‘survival rights’ such as food, clothing, or housing, it affects the level of satisfaction of many other human rights such as the rights to education, culture, and health.”

²⁴⁰ See, for example, Donati P “The changing meaning of work (secularised vs humanistic) and its implications for the new society” in Archer MS (ed) *Towards Reducing Unemployment: The Proceedings of the Fifth Plenary Session of the Pontifical Academy of Social Sciences 3-6 March 1999* (Pontifical Academy of Social Sciences (1999)) 287 at 295-296.

²⁴¹ Burgess J and Mitchell WF *Unemployment, Human Rights and Full Employment in Australia* (Centre of Full Employment and Equity (1998)) 10.

“As a starting point, labour income constitutes the major income source for the majority of individuals and households. Without income, ability to participate in a market economy is curtailed. This exclusion has long been recognised through the provision of safety net protection for those who are unable to participate in the labour market by virtue of age, infirmity and caring responsibilities. It was also the case for those who were without labour income by virtue of unemployment. Access to income also governs access to other rights, including minimum requirements of clothing, food and housing. Paid employment shares a direct relationship with food and water as requisite for subsistence in many societies. Unemployment and underemployment, together with a lack of access to fertile agricultural land, means inadequate income, misery and early death for millions across the globe. Paid work provides the employed with choice in the market economy and the opportunity for advancement. The unemployed have limited access to credit and limited access over the range of goods and services they can purchase. They are not in a position to save for education, holidays and housing improvements. Their choices are constrained by their lack of income. Without social transfers they have to depend upon savings, family transfers or black economy activities in order to sustain minimum living standards. Their exclusion goes beyond this. They are not accorded the status attached to employment and they make no contribution to market activity [as well as] the barometer of worth in a market economy.”

The Constitution, with its Bill of Rights, makes no express provision for the right to work. However, this should not be understood as implying that such a right might not be construed from other rights entrenched in the Bill of Rights. This stems from the fact that “[w]ork is the first of all human rights, if not for its place in the hierarchy of rights, then for its importance as the means by which other rights are realized.”²⁴² The Constitution embodies rights relating to “a right to enter employment”²⁴³ (unemployment protection²⁴⁴) and “a right not to be unjustly deprived of work”²⁴⁵ (employment protection). Section 22 of the Constitution provides every citizen with a right to choose his or her trade, occupation or profession freely. In accordance with *Hawker v Life Offices Association*,²⁴⁶ “[i]t is...in the public interest...that, as far as it is reasonable to allow, a man be at liberty to pursue his chosen calling.” An

²⁴² Bentacur B “The present and future of work” in Archer M and Malinvaud E (eds) *The Future of Labour and Labour in the Future: Proceedings – Second Plenary Session of the Pontifical Academy of Social Sciences 20-23 March 1996* (Pontifical Academy of Social Sciences (1998)) 113.

²⁴³ Craven MCR *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon (1995)) at 205.

²⁴⁴ See paragraph 2. in chapter 3.

²⁴⁵ Craven MCR *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon (1995)) at 205.

²⁴⁶ (1987) 8 ILJ 231 (C) at 244.

infringement of a person's right to exercise his or her chosen calling could result in a delictual claim.²⁴⁷ In addition, the Constitution makes provision for every person's right to fair labour practices²⁴⁸ as well as every worker's right to form and join a trade union; to participate in the activities and programmes of a trade union; and to strike.²⁴⁹ Other fundamental rights enshrined in the Constitution – such as equality,²⁵⁰ human dignity,²⁵¹ life,²⁵² as well as labour law rights – are, subject to the limitation clause²⁵³ and the interpretation clause,²⁵⁴ relevant for the elements of the right to work (namely unemployment and employment protection).

²⁴⁷ See Neetling J and Le Roux PAK “Die positiefregtelike erkenning van die reg op die verdienvermoë of “The right to exercise a chosen calling”” (1987) 8 *Industrial Law Journal (South Africa)* 719.

²⁴⁸ S 23(1) of the Constitution.

²⁴⁹ S 23(2) of the Constitution.

²⁵⁰ Section 9 of the Constitution provides that: “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

²⁵¹ Ss 1(a) and 10 of the Constitution. See Chaskalson A “Human dignity as a fundamental value of our constitutional order” (2000) 16 *South African Journal on Human Rights* 193, Currie I and De Waal J *The Bill of Rights Handbook* (5th ed) (Juta (2005)) 272-279, Davis D “Dignity” in Davis D *et al* (eds) *Fundamental Rights in the Constitution: Commentary and Cases* (Juta (1997)) 70.

²⁵² S 11 of the Constitution. See *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 *BCLR* 665 (CC). Also see Currie I and De Waal J *The Bill of Rights Handbook* (5th ed) (Juta (2005)) 280-290.

²⁵³ Section 36 of the Constitution makes provision for the limitation of rights as follows: “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

²⁵⁴ S 39 of the Constitution: “When interpreting social rights entrenched in the Bill of Rights, any South African court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law” (s 39(1) of the Constitution).

1.2.2. Right of access to social security: An unemployment protection perspective

The Constitution, in section 27(1)(c), provides for the right of everyone of access to “social security, including if they are unable to support themselves and their dependents, appropriate social assistance.” The Constitution also requires the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.²⁵⁵ The right of access to social security will be discussed from an (un)employment protection perspective as well as what could constitute appropriate assistance for the unemployed in South Africa.

1.2.2.1. The right to work and the right of access to social security

Work represents the primary source of income on the basis of which many individuals meet their social security needs and those of their families. In light of the fact that lifelong employment cannot (always) be guaranteed,²⁵⁶ social security schemes (of both social insurance (e.g. unemployment insurance) and social assistance (e.g. unemployment assistance) nature) have been devised to assist individuals and the families cope with unemployment. The *Universal Declaration of Human Rights* (1948) provides every person with the right to *work*, to *free choice of employment*, to *just and favourable conditions of work* and to *protection against unemployment*.²⁵⁷ This provision, it appears, requires that work should be safeguarded and, where it is impossible to do so, security should be provided against joblessness.

The phrase ‘right to access to’, as opposed to the ‘right to’, was earlier viewed by some commentators as a limitation of the right to social security (as contained in the South African

²⁵⁵ S 27(2) of the Constitution.

²⁵⁶ See paragraph 3. in chapter 3.

²⁵⁷ Article 23 of *Universal Declaration of Human Rights* (1948) (emphasis added). Also see article 6(1) of the *International Covenant on Economic, Social and Cultural Rights* and Mayer J “The concept of the right to work in international standards and the legislation of ILO member states” (1985) 124 *International Labour Review* 225.

Constitution).²⁵⁸ The Constitutional Court has, however, concluded in the *Government of the Republic of South Africa v Grootboom*²⁵⁹ – a case concerning the right of access to adequate housing²⁶⁰ – that the ‘right to access to’ can, as a matter of fact, be interpreted broader than the ‘right to’.²⁶¹ In light of the fact that sections 26 and 27 of the Constitution refer to the ‘right of access to’, it could be inferred from *Government of the Republic of South Africa v Grootboom* that the ‘right to access to’ social security, as entrenched in section 27(1)(c) of the Constitution, means more than a pure ‘right to’ social security.²⁶² The conclusion to be drawn is that, apart from giving courts – particularly the constitutional court – a leeway in interpreting rights involved and/or socio-economic rights broadly, the ‘right to access to’ carries more weight than a ‘right to’.²⁶³ Furthermore, the right of access to social security as found in the South African Constitution, it is submitted, imposes a duty on the state to, within the overall social protection system, develop a comprehensive unemployment protection system. This right includes, by implication, the right to unemployment protection. This is, *inter alia*, on account of the fact that the term social security covers a variety of social risks which include unemployment.²⁶⁴

1.2.2.2. Appropriate assistance for the unemployed

(a) Introductory remarks

The constitutional right of access to social security stretches beyond social insurance to include social assistance measures. This makes sense because social security is not only about social insurance, since it goes further than that by providing a safety net to those who are unable to support themselves as well as their dependants. It can be argued that the right to access to appropriate social assistance for the needy applies to the unemployed and destitute

²⁵⁸ See, for example, Liffmann R “Social security as a constitutional imperative: An analysis and comparative perspective with emphasis on the effect of globalization on marginalization” in Olivier MP *et al* (eds) *The Extension of Social Security Protection in South Africa: A Legal Inquiry* (Siber Ink (2001)) 29 at 40.

²⁵⁹ 2000 11 BCLR 1169 (CC).

²⁶⁰ S 26 of the Constitution.

²⁶¹ Olivier MP *et al* “Constitutional issues” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 49 at 57.

²⁶² *Ibid.*

²⁶³ *Ibid.*

²⁶⁴ See the Social Security (Minimum Standards) Convention 102 of 1952.

masses of South Africa as well. Section 7(2) of the Constitution requires the state to respect, protect, promote and fulfil the rights entrenched in the Bill of Rights. Two types of duties imposed on the state can be inferred from section 7(2), i.e. negative and positive duties: “The duty to respect essentially entails negative state action, requiring the state not to interfere unduly. The duties to protect, promote, and fulfil – on the other hand – place positive duties on the state and may also require positive action from the courts.”²⁶⁵ Read in conjunction with section 27(2) of the Constitution, section 7(2) imposes a duty on the state to give effect to the right of access to social security.²⁶⁶ Even so, this duty is subjected to the availability of resources.²⁶⁷

At the moment, the risk of being unemployed is covered through an unemployment insurance scheme and, to a certain extent, by social assistance grants.²⁶⁸ The unemployment insurance scheme, with its limited scope of coverage,²⁶⁹ is an inadequate measure to satisfy the unemployment protection needs of South Africa. It is true that there are social assistance grants²⁷⁰ available, but these grants (which are not directly aimed at unemployment) are only available to those who are (apart from being needy) young enough, disabled enough or old enough and are not able to work. This spells out one thing – those unemployed persons who do not fit in one of the foregoing categories or never contributed to the unemployment insurance schemes or exhausted their unemployment insurance benefits are left at the mercy of poverty, as there are no universal benefits and/or state financed benefits (specifically targeted at the unemployed persons), such as unemployment assistance.²⁷¹ In view of the

²⁶⁵ Olivier MP *et al* “Constitutional issues” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 49 at 78.

²⁶⁶ It is abundantly clear from decisions handed down by the South African courts (inclusive of the Constitutional Court) that courts will not hesitate when and where they deem it appropriate to order the state to ensure that social security and social security related rights are properly realised. See, for example, *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 12 BCLR 1696, *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC), and *Treatment Action Campaign v Minister of Health* 2002 4 BCLR 356 (T) and *Minister of Health v Treatment Action Campaign* 2002 10 BCLR 1033 (CC).

²⁶⁷ S 27(2) of the Constitution.

²⁶⁸ See Natrass N “Unemployment and Aids: The social-democratic challenge for South Africa” (2004) 21 *Development Southern Africa* 87 at 94.

²⁶⁹ See paragraph 2.2.2. below.

²⁷⁰ See the *Social Assistance Act* 13 of 2004 and Mpedi LG *et al* “Welfare and legal aid” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 197.

²⁷¹ Central to this problem, lies the fact that: “South Africa’s current welfare state regime is premised on the belief that people need support through the state or market only when too young or too old to work, or during brief periods of unemployment (in between long periods of employment when they are able to contribute to

insurance nature of the current scheme, it cannot be expected of an unemployment insurance scheme to accommodate individuals who are not employed, such as the unemployed youth and women who are involved in unpaid care work.²⁷² With a view of either introducing or expanding the scheme a detailed and extensive investigation should be conducted on one or a combination of the following tax financed alternatives, i.e. the introduction of universal benefits, the gradual extension of social assistance benefits and/or tax financed services or combining universal benefits with tax financed benefits or services.

(b) Introduction of universal schemes

Universal schemes are rarely implemented in developing countries.²⁷³ In the unemployment protection sphere, a universal scheme could take the form of a citizenship income grant or universal unemployment assistance (targeted at specific categories of the unemployed such as the unemployed youth)). However, the citizenship income grant is “[t]he widest possible form of universal cash benefit...which would be provided not only for groups such as children and the elderly – who are not expected to earn their living – but also for the able-bodied of working age.”²⁷⁴ One of the advantages of universal schemes is that “they cover people regardless of their employment status and work history.”²⁷⁵ The problem with universal schemes is that their continued affordability cannot be guaranteed for the reason that they “compete every year with all the government’s other expenditure priorities”²⁷⁶ and

unemployment insurance).” Natrass N and Seekings J “Citizenship and welfare in South Africa: Deracialisation and inequality in a labour-surplus economy” (1997) 31 *Canadian Journal of African Studies* 452 at 467.

²⁷² As concluded by the ILO Committee of Social Security Experts Actuarial Subcommittee at its meeting in December 1973 (cited in ILO *Social Security for the Unemployed* (ILO (1976)) 26): “Unemployment insurance could obviously not offer a complete solution to the social and economic consequences of unemployment, either in industrialised or developing countries. It was basically a social insurance system to provide income security with respect to the clearly defined contingency of temporary loss of income by persons who were in the labour force but were unable to work. Benefit duration, on such an insurance approach, had to be limited. For any extension of objective beyond this, non-contributory assistance or welfare programmes financed from the general revenue were more appropriate – an argument applying with especial force to countries or to periods of economic recession in which unemployment levels were exceptionally high.”

²⁷³ Beattie R “Social protection for all: But how?” (2000) 139 *International Labour Review* 129 at 142.

²⁷⁴ ILO *Social Security: Issues, Challenges and Prospects* (ILO (2001)) 65.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

“[w]hat may be perceived as affordable one year may be less so the next, if policies or economic conditions have changed.”²⁷⁷

A universal benefit scheme, in the form of a Basic Income Grant (BIG) of R100 per month,²⁷⁸ has been recommended for introduction in South Africa.²⁷⁹ The proposed introduction of the BIG has been received with mixed feelings in South Africa. The proponents of a universal scheme²⁸⁰ argue that such a scheme has great potential in extending access to social security.²⁸¹ The proposed BIG has been hailed as one mechanism that can significantly reduce the number of persons living below the poverty line.²⁸² This is fairly

²⁷⁷ *Ibid.*

²⁷⁸ According to Naidoo (Naidoo R “The Basic Income Grant: Poverty, politics and policy-making” Paper presented at the Harold Wolpe Lecture Series, University of Natal, 31 October 2002) a Basic Income Grant is: “...a grant that is paid to all citizens without the psychologically damaging stigma of means testing. In other words, it is a universal grant that does not impose a judgement as to whether someone is a ‘deserving’ poor person or not. Rather this grant goes to everyone as a right. This does not mean that the rich actually get the benefit, since the tax system can be reworked to secure that the better off actually pay back the cost of the grant...” See, for further reading on the Basic Income Grant, Samson M *et al Research Review on Social Security Reform and the Basic Income Grant for South Africa* (Economic Policy Research Institute (2002)) – accessed at <http://www.epri.org.za/rp31.pdf>, Van der Berg S “The Basic Income Grant: Comments on the report of the Committee of Inquiry into a Comprehensive Social Security System” – accessed at http://www.safoundation.org.za/documents/THE_BASIC_INCOME_GRANT.doc, McDonald S “The impact of the proposed Basic Income Grant on the Western Cape” A paper prepared for the 6th Annual Conference on Global Economic Analysis, The Hague, Netherlands, 12-14 June 2003, Matisson HM and Seeking J “Welfare in wonderland?: The politics of the Basic Income Grant in South Africa” Paper prepared for the Political Studies Seminar, University of Cape Town, 27 August 2002, Thurlow J *Can South Africa Afford to Become Africa’s First Welfare State?* (International Food Policy Research Institute (2002)) and Bhorat H “Is a universal income grant the answer? (2002) 26 *SA Labour Bulletin* 19. See, for further reading about the BIG notion, Van der Veen R and Groot L (eds) *Basic Income on the Agenda: Policy Objectives and Political Chances* (Amsterdam University Press (2000)), Guibentif P and Bouget D *Minimum Income Policies in the European Union* (European Commission (1997)) and Van Parijs P (ed) *Arguing for Basic Income: Ethical Foundations for a Radical Reform* (Verso (1992)).

²⁷⁹ See, Makino K *Social Security Policy Reform in Post-Apartheid South Africa: A Focus on the Basic Income Grant* (Centre for Civil Society (2004)), Natrass N “Unemployment and Aids: The social-democratic challenge for South Africa” (2004) 21 *Development Southern Africa* 87 at 95-99 and Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa* (March 2002) 63.

²⁸⁰ In South Africa such proponents include, among others, the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (hereafter the Committee), certain political parties (e.g. Democratic Alliance), the labour movement (e.g. the Congress of South African Trade Unions (COSATU)) and Non Governmental Organisations (NGO) (e.g. the South African Council of Churches and the South African NGO Coalition (SANGOCO)).

²⁸¹ ILO *Social Security: Issues, Challenges and Prospects* (ILO (2001)) 64.

²⁸² According to the Committee, the BIG has a potential for reducing the poverty gap in South Africa by 74% thereby freeing an additional 6.3 million South Africans from the claws of poverty (Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa* (March

understandable for, among others, the reason that access to universal benefits is not subject to the means test or involvement in contributory employment. It could be argued, therefore, that universal benefits are an ideal mechanisms to provide access to state financed benefits to a majority of the excluded and marginalised groups and categories of persons such as women (particularly those involved in unpaid care work), unemployed youth (particularly those that never worked) and informal economy workers.²⁸³ Furthermore, the BIG has in the light of the AIDS pandemic the ability to reach those who are too ill to participate in the public works programme.²⁸⁴ Even so, the South African government is yet to endorse the BIG. The reasons advanced by the government for its rejection of BIG include, among others, that BIG is fiscally unsustainable and that South Africa lacks the institutional capacity for its implementation.²⁸⁵ In addition, there is a perception that the BIG will ‘create dependency’.²⁸⁶

(c) Extension of social assistance benefits and/or tax financed services

- Social assistance benefits. It is an acknowledged fact that social assistance benefits do play a role in aiding certain individuals as well as their families to cope with unemployment.²⁸⁷ Social assistance benefits, in a majority of instances, filters (by means

2002) 63). Albeit the Committee acknowledges that conditions for immediate implementation do not exist, it is of a view that: “Analysis indicates that the Basic Income Grant has the potential, more than any other possible social protection intervention, to reduce poverty and promote human development and sustainable livelihoods. A universal Basic Income Grant has the potential to fortify the ability of the poor to manage risks thus contributing to socio-economic multipliers effects related to improved household self-reliance, efficiency of social capital and social cohesiveness...income support of this nature would assist the poor to access Government services, thereby improving the effectiveness of many service delivery programmes and social policies” (Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa* (March 2002) 62). Borat (Bhorat H “A universal income grant scheme for South Africa: An empirical assessment” Paper presented at the 9th International Congress of the Basic Income European Network, Geneva, 12-14 September 2002), estimates that the BIG could reduce the numbers of persons living below the poverty line by about two-thirds.

²⁸³ Beattie R “Social protection for all: But how?” (2001) 139 *International Labour Review* 129 at 143.

²⁸⁴ Nattrass N “Unemployment and Aids: The social-democratic challenge for South Africa” (2004) 21 *Development Southern Africa* 87 at 97.

²⁸⁵ See, among others, Makino K *Social Security Policy Reform in Post-Apartheid South Africa: A Focus on the Basic Income Grant* (Centre for Civil Society (2004)) 21 and Haffajee F “More grants no big” *Mail & Guardian* 3-9 September 2004.

²⁸⁶ See, for example, Naidoo R “The Basic Income Grant: Poverty, politics and policy-making” Paper presented at the Harold Wolpe Lecture Series, University of Natal, 31 October 2002.

²⁸⁷ See Nattrass N “Unemployment and Aids: The social-democratic challenge for South Africa” (2004) 21 *Development Southern Africa* 87 at 94, Streak J and Van der Westhuizen C *Fitting the Pieces Together: A Composite View of Government’s Strategy to Assist the Unemployed in South Africa 1994-2004* (IDASA

of informal transfers) through to other individuals related to or living with social assistance beneficiaries. It is true that such informal transfers dilute the impact of the grants on intended beneficiaries. In addition, no means test is perfect. Ineligible persons (in the form of ‘ghost beneficiaries’ and so forth) often find their way into the list of social assistance beneficiaries. Furthermore, social assistance benefits often fail to reach the intended beneficiaries due to, among others, social stigma, ignorance, complicated application procedures, and excessive administrative discretion.²⁸⁸ Even so, it should be stressed that social assistance benefits do alleviate the impact of unemployment. To this end, it is argued that the progressive extension of social assistance grants, in terms of value as well as the scope of coverage could play an important role in endeavours to alleviate poverty which is one of the direct consequences of unemployment.²⁸⁹

- Tax financed services. Instead of adopting the BIG the South African government opted to enlarge the public works programme²⁹⁰ by introducing the Expanded Public Works Programme (EPWP).²⁹¹ This approach, it opined, is in line with the government’s set task of adopting developmental social welfare policies and programmes.²⁹² These policies and programmes are based on principles such as, among others, sustainability and appropriateness.²⁹³ The goal of the ‘sustainability’ principle is to ensure that intervention strategies designed to address priority needs are financially viable, cost efficient and effective.²⁹⁴ The ‘appropriateness’ principle is intended at ensuring that:

(2004)) 32 and *Transforming the Present – Protecting the Future: Draft Consolidated Report* (Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (2002)) 59.

²⁸⁸ ILO *Social Security: Issues, Challenges and Prospects* (ILO (2001)) 66.

²⁸⁹ See for example, Streak J and Van der Westhuizen C *Fitting the Pieces Together: A Composite View of Government’s Strategy to Assist the Unemployed in South Africa 1994-2004* (IDASA (2004)) 32-33.

²⁹⁰ See, for example, “Less welfare, more public works” *Mail & Guardian* 5 August 2003 – accessed at <http://archive.mg.co.za>, and Streak J and Van der Westhuizen C *Fitting the Pieces Together: A Composite View of Government’s Strategy to Assist the Unemployed in South Africa 1994-2004* (IDASA (2004)) 33-35.

²⁹¹ See paragraph 2.3.2.4. in chapter 3.

²⁹² See, generally, Bak M “Can developmental social welfare change an unfair world?: The South African experience” (2004) 47 *International Social Work* 81, Gathiram N and Hemson D “Transformation of welfare?: Race, class, and gender in the management of welfare agencies in South Africa” (2002) 37 *Community Development Journal* 209 and Mallagee F and Nyman R “Developmental welfare: Who benefits and who bears the costs? – accessed at <http://www.idasa.org.za>.

²⁹³ *White Paper for Social Welfare: Principles, Guidelines, Recommendations, Proposed Policies and Programme for Developmental Social Welfare in South Africa* General Notice 1108 of 1997 – accessed at <http://www.polity.org.za>.

²⁹⁴ *Ibid.*

“Social welfare programmes, methods and approaches will be appropriate, will complement and strengthen people’s efforts, enhance their self-respect and independence and will be responsive to the range of social, cultural and economic conditions in communities. The sustainable use of human, material and the earth’s natural resources will be ensured for the benefit of future generations.”²⁹⁵

The problem with public works programmes, in comparison with the BIG, is that a large portion of the resources are siphoned by administration instead of being directed at the poor.²⁹⁶

(d) Combining universal benefits with other tax financed benefits or services

Another alternative for South Africa is to progressively introduce universal benefits alongside other tax financed benefits (such as social assistance benefits) and/or tax financed services (such as public works programmes). The rationale behind this suggestion is that there is no single intervention that can (single-handedly) serve as an appropriate social assistance measure for the unemployed in South Africa. It should be emphasised that what should be regarded as an appropriate social assistance system should not be limited to income, but should include measures – which are by far insufficient in South Africa – aimed at the (re)integration of the unemployed into the labour market.²⁹⁷ A combination of income benefits as well as other measures aimed at (re)integrating the unemployed (such as (re)training the unemployed) has the advantage of ensuring that they enjoy other advantages associated with employment such as self-fulfilment. The truth is that employment is not all about income. It goes beyond that, for it enhances a person’s stature economically, socially

²⁹⁵ *Ibid.*

²⁹⁶ Nattras N “Unemployment and Aids: The social-democratic challenge for South Africa” (2004) 21 *Development Southern Africa* 87 at 96. See, for further reading on the disadvantages of public works programmes, paragraph 2.3.3. in chapter 3.

²⁹⁷ It should be remembered that: “For many citizens in need, income is the least of their problems. If they are unemployed, they need work; if they cannot find work they need training; if they need training, they need the right kind of training. Second, for some citizens in need, being given money is no solution to their problem and may make things worse. For example in the dissertation...[by Jon Arve Nervik, of the University of Trondheim], Dr Nervik found that young recipients of social assistance were more likely to end in long-term dependency on some kind of assistance the earlier they had become social assistance recipients and that in this there is an element of ‘learned dependency’...” (Ringen S “Social security, social reform and social assistance” in Pieters D (ed) *Social Protection for the Next Generation in Europe* (Kluwer (1998)) 27 at 39-40).

and mentally. Increasing a number of such persons is, apart from being important for the societal well-being, the overall goal of an unemployment protection system.

In conclusion, it can be opined that the right to access to social security has, in the wake of high unemployment in South Africa and the lack of an appropriate social assistance system for the unemployed, far-reaching implications. In short, the current unemployment protection system is vulnerable to a constitutional challenge. The basis of such a challenge could be that the exclusion of the majority of the unemployed persons from the current unemployment protection system unfairly and unjustifiably violates the rights of the unemployed persons (and, in certain instances, those of their dependants), such as the right of access to social security, dignity and life.

2. UNEMPLOYMENT PROTECTION

2.1. Introduction

The South African unemployment protection system, with its long history of exclusions and marginalisation,²⁹⁸ provides protection against unemployment through an unemployment insurance scheme. While there are other measures (such as tax funded social assistance benefits and public works programmes as well as informal coping strategies²⁹⁹) which play a role in cushioning the negative impact of unemployment, the South African unemployment protection system does not provide for unemployment assistance benefits. Means-tested social assistance benefits, as mentioned above, are limited to certain categories of persons and are not directly targeted at the unemployed. In practice these social assistance grants, through informal transfers, filter through to benefit unemployed persons in the household context. Notwithstanding the poverty alleviation role of the unemployment insurance benefits and that of informal transfers, a majority of the unemployed are left at the mercy of poverty. This could be attributed to, among others, the fact that the South African unemployment protection system is based on an assumption that unemployment is transient (which is not the

²⁹⁸ See, for example, Nattrass N and Seekings J “Citizenship and welfare in South Africa: Deracialisation and inequality in a labour-surplus economy” (1997) 31 *Canadian Journal of African Studies* 452 at 459-462.

²⁹⁹ See paragraph 2.4.2., on informal social security, below.

case anymore);³⁰⁰ while benefits are low;³⁰¹ does not provide unemployment benefits for those who exhausted their unemployment insurance benefits;³⁰² lacks (or has limited) measures aimed at the (re)integration of unemployed persons into the labour market;³⁰³ and excludes many groups and categories of persons from its scope of coverage (for example, it pays little or no attention to youth unemployment and the plight of those who are employed in the informal economy).³⁰⁴

2.2. Unemployment insurance

2.2.1. Introduction

The South African Unemployment Insurance (UI) system dates back to 1937 with the enactment of an act aimed at providing payment of benefits to workers in certain industries who were capable of and available for work but were unemployed. This was in response to the high unemployment level during the depression of the 1930's.³⁰⁵ The scope of this legislation was (to some extent) limited.³⁰⁶ The state was only concerned about the eradication of poverty among whites.³⁰⁷ Among those who were excluded from the ambit of

³⁰⁰ As Nattrass and Seekings (Nattrass N and Seekings J "Citizenship and welfare in South Africa: Deracialisation and inequality in a labour-surplus economy" (1997) 31 *Canadian Journal of African Studies* 452 at 467-468) point out: "South Africa's current welfare state regime is premised on the belief that people need support through the state or market only when too young or too old to work, or during brief periods of unemployment (in between long periods of employment when they are able to contribute to unemployment insurance). Similar assumptions in the advanced capitalist economies prior to the 1970s were rooted in the fact that full employment could be maintained, and the life cycle therefore took people from dependence as children to secure employment, to dependence again after retirement. Under apartheid, a similar situation was maintained for white citizens through racial discrimination. In contemporary South Africa, by contrast, many poor citizens spend much of their adult lives outside of formal employment (or formal "self-employment"). Most South Africans of working age outside of formal employment have therefore not been supported by the state or market-based welfare systems. Many have received limited earnings from casual employment and informal sector activity."

³⁰¹ See paragraph 2.2.5. in chapter 3.

³⁰² See paragraph 1.2.2.2. in chapter 3.

³⁰³ See, for example, paragraphs 2.2.1., 2.3.1. and 2.3.4. in chapter 3.

³⁰⁴ See paragraph 2.2.2. in chapter 3.

³⁰⁵ In 1930, for example, 400 000 whites out of a total population of 2 million whites were alleged to live in destitution. Klausen S "The uncertain future of white supremacy and the politics of fertility in South Africa – 1930-1939" – accessed at <http://wiserweb.wits.ac.za/PDF%20Files/international%20-%20klausen.PDF>.

³⁰⁶ See, for example, Nattrass N and Seekings J "Citizenship and welfare in South Africa: Deracialisation and inequality in a labour surplus-economy" (1997) 31 *Canadian Journal of African Studies* 452 at 459.

³⁰⁷ Widespread poverty among the white population was, for a variety of reasons, viewed as a big problem – hence the phenomenon was widely referred to as the 'poor white' problem. See, for an interesting discussion of

the UI were agricultural workers, African gold and coal workers and domestic workers. Coverage was, commencing from 1979, gradually extended. Rural workers, excluding agricultural workers, were the first to be included. Gold and coal mining followed in 1981.³⁰⁸ Agricultural workers, on the other hand, enjoyed coverage only in 1993.³⁰⁹

The introduction of the new *Unemployment Insurance Act* (UIA)³¹⁰ and its sister act, the *Unemployment Insurance Contributions Act* (UICA),³¹¹ ushered a new era in the South African unemployment protection system – particularly in the area of unemployment insurance. These two unemployment insurance statutes revolutionised unemployment insurance in South Africa in, *inter alia*, the following respects: for the first time in the history of unemployment insurance in South Africa, two statutes make provision for the regulation of unemployment insurance;³¹² the UIA extended the scope of unemployment insurance coverage in South Africa to certain previously excluded groups of persons including domestic workers, seasonal workers and the so-called high income earners;³¹³ maintained some (e.g. civil servants) and introduced new exclusions (e.g. persons working in terms of a registered learnership agreement);³¹⁴ introduced a graduated scale of benefits;³¹⁵ and made

the so-called ‘poor white’ problem, Van der Horst ST *Native Labour in South Africa* (Frank Cass (1971)) 173-185. Also see Klausen S “The uncertain future of white supremacy and the politics of fertility in South Africa – 1930-1939” – accessed at <http://wiserweb.wits.ac.za/PDF%20Files/international%20-%20klausen.PDF>.

³⁰⁸ See Nattrass N and Seekings J “Citizenship and welfare in South Africa: Deracialisation and inequality in a labour-surplus economy” (1997) 31 *Canadian Journal of African Studies* 452 at 464.

³⁰⁹ *Ibid.*

³¹⁰ Act 63 of 2001. The UIA has been enacted to, *inter alia*, establish the Unemployment Insurance Fund; provide for the payment from the Fund of unemployment benefits to certain employees, and for the payment of illness, maternity, adoption and dependant’s benefits related to the unemployment of such employees; and provide for the establishment of the Unemployment Insurance Board, the functions of the Board and the designation of the Unemployment Insurance Commissioner (Preamble and s 2 of the UIA).

³¹¹ Act 4 of 2002. The UICA, on the other hand, has been enacted to provide for the imposition and collection of contributions for the benefit of the Unemployment Insurance Fund; and to provide for procedures for the collection of such contributions (Preamble and s 2 of the UICA).

³¹² The UIA largely provides for the payment of unemployment benefits. The UICA, on the other hand, makes provision for the collection of benefits. The South African Revenue Services (SARS) registered employers are required to pay contributions to the SARS Commissioner (see s 8 of the UICA and South African Revenue Services *Unemployment Insurance Contributions: Guideline to Employers* (South African Revenue Services (2002)) – accessed at http://www.sars.gov.za/uif/guidelines/uif_brochure.pdf). The UIA, on the other hand, regulates the collection of contributions from employers other than those who are registered with the SARS (see s 9(1) of the UICA).

³¹³ See paragraph 2.2.2.1. in chapter 3.

³¹⁴ See paragraph 2.2.2.2. in chapter 3.

³¹⁵ See paragraph 2.2.5. in chapter 3.

provision for a new dispute resolution mechanism.³¹⁶ Viewed from a policy perspective, the UIA “contains little in terms of a statutory framework for comprehensive unemployment policy making.”³¹⁷ Furthermore, “[b]roader unemployment policy objectives are not reflected in the purpose provision of the UIA which restricts itself to the unemployment insurance fund provided for by the Act.”³¹⁸ The UIA, unlike the *Unemployment Insurance Act 30 of 1966*, neglected to provide the Minister of Labour with the power to introduce schemes to combat unemployment.

2.2.2. Scope of coverage

2.2.2.1. Recently included persons

The scope of coverage of the South African unemployment insurance system, as indicated earlier, is limited. While the UIA extended its scope of coverage, much more still needs to be done to narrow exclusion and marginalisation in the unemployment insurance system as well as in the unemployment protection system in general. The UIA, unlike its predecessor, widened its scope of coverage to include domestic workers, seasonal workers and the so-called high-income earners. The inclusion of domestic workers³¹⁹ and seasonal workers,³²⁰

³¹⁶ See paragraph 2.2.7. in chapter 3.

³¹⁷ Van Kerken ET and Olivier MP “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 418. Section 48 of the UIA imposes an obligation on the Unemployment Insurance Board to advise the Minister of Labour on unemployment insurance policy, policies arising out of the application of the UIA, policies for minimising unemployment, and the creation of schemes to alleviate the effects of unemployment.

³¹⁸ Van Kerken ET and Olivier MP “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 418.

³¹⁹ A ‘domestic worker’, as defined by s 1 of the UIA and s 1 of the UICA, is “an employee who performs domestic work in the home of his or her employer, and includes a gardener, person employed by a household as a driver of a motor vehicle, and person who takes care of any person in that home, but does not include farm worker.”

³²⁰ Prior to the *Unemployment Insurance Amendment Act 32 of 2003*, s 1 of the UIA and s 1 of the UICA defined a ‘seasonal worker’ to mean “any person who is employed by an employer for an aggregate period of at least three months over a 12 months period with the same employer and whose work is interrupted by reason of a seasonal variation in the availability of work.” This definition has been deleted by s 1 of the *Unemployment Insurance Amendment Act 32 of 2003*. The rationale behind this deletion is, as the *Memorandum on the Object of the Unemployment Insurance Amendment Bill 35 of 2003*, “to treat seasonal workers the same as other employees.”

despite the scepticism expressed prior to their inclusion,³²¹ appears to be progressing satisfactorily.³²² The recent amendment to the UIA³²³ extended the right to benefits to domestic workers who are employed by more than one employer³²⁴ as well as the right to unemployment benefits to a domestic worker whose contract of employment is terminated by the death of his or her employer.³²⁵ This is to be welcomed for the reason that the provision of benefits in the case of partial unemployment provides the affected person with an opportunity to remain in the labour market. Furthermore, this is in accordance with the *Employment Promotion and Protection against Unemployment Convention*³²⁶ which requires the payment of benefits in the case of partial unemployment.³²⁷ As regards high-income earners, this category of employees was excluded from the scope of coverage of the UIA since it was regarded as a group which was unlikely to suffer from unemployment and its effects. Nevertheless, the drafters of the UIA deemed it necessary to strengthen the financial

³²¹ Meth (Meth C “Widening the net: Incorporating domestic workers into the social security system” (2001) 4 *NALEDI Policy Bulletin* – accessed at <http://www.naledi.org.za/pbull/vol4no2/v4n2a6.htm>), for example, explained the problem of the inclusion of domestic workers as follows: “There are two major obstacles to extending social insurance to domestic workers. The first is the compilation of the contributor records on the basis of which entitlements may be created. Without adequate records, the possibilities for fraudulent abuse of the scheme would be significant. It is hard enough to create contributor records for the five million or so workers currently covered by the UIF. Domestic workers are scattered amongst about a quarter of a million employers. The bulk of the contributors are of course concentrated among a much smaller number of employers. Even so, it has not been possible, thus far, to create a contributor database. A further complicating factor is that many domestic workers work for more than one employer. There may be as many as several million employers. The second problem is the low level of contributions that are likely to be forthcoming. Domestic workers are poorly paid. The cost to the state of collecting contributions will probably far exceed the value of those contributions. For example, if the average monthly wage of domestic workers were about R800 (it is probably lower), then, under the existing rules, worker and employer would each contribute R96 per annum. If it costs more to collect the money than the contributions are worth, good sense dictates that the state writes off the amount concerned. Alternatively, new ways will have to be found to collect the contributions.”

³²² According to the Department of Labour (Department of Labour *Annual Report of the Unemployment Insurance Fund for the Period 1 April 2003 to 31 March 2004* (Department of Labour (2004)) 5), the UIF had 427 938 commercial employers and 5 742 942 commercial workers (these categories of employers and employees include seasonal and farm workers) on its database at the time covered by the report. As far as domestic workers are concerned, the report points out that the UIF registered more than 590 000 employers of domestic workers and 480 000 domestic workers during the 2003/2004. Also see Mokopanele T “More than 600 000 domestic employers on UIF” *Mail & Guardian Online* 2 June 2004 – accessed at <http://www.mg.co.za>.

³²³ *Unemployment Insurance Amendment Act* 32 of 2003.

³²⁴ S 12(1A) of the UIA.

³²⁵ S 16(1)(a)(iv) of the UIA.

³²⁶ Convention 168 of 1988.

³²⁷ Article 10(2)(a) of the *Employment Promotion and Protection against Unemployment Convention* imposes a duty on ratifying member states to extend protection to the loss of earning due to partial unemployment, defined as a temporary reduction in the normal or statutory hours of work. In addition, article 10(3) of the *Employment Promotion and Protection against Unemployment Convention* requires ratifying member states to endeavour to provide the payment of benefits to part-time workers who are actually seeking full-time work. The total of benefits and earnings from their part-time work may be such as to maintain incentives to take up full-time work.

base of the UIF by extending the UIA's scope of coverage by including this group of employees.

2.2.2.2. Excluded persons

Despite the abovementioned inclusions, the South African unemployment insurance system still marginalises certain groups and categories of persons from its unemployment protection shield. These groups and categories of marginalised persons are as follows:

- (a) Persons who do not fall within the definition of 'employee'. The UIA defines an employee as "any person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor."³²⁸ This definition, which is narrower than that contained in labour laws,³²⁹ excludes a variety of vulnerable groups from the UIA's scope of coverage. These excluded groups comprise largely of certain categories of the atypical workers (e.g. the independent contractors, the dependent contractors, and the self-employed), the informal economy workers and the long-term unemployed. To this end, South Africa should broaden the definition of 'employee' so as to extend unemployment insurance to some of the aforesaid excluded and marginalised persons. Furthermore, it could use sectoral determinations to extend coverage to certain

³²⁸ S 1 of the UIA.

³²⁹ The definition of 'employee' contained in s 1 of the *Basic Conditions of Employment Act* 75 of 1997 (the BCEA) and s 213 of the *Labour Relations Act* 66 of 1995 (the LRA), for example, covers "any other person who in any manner assists in carrying on or conducting the business of an employer." In addition, s 83A of the BCEA and s 200A of the LRA (as amended) make provision for a rebuttable presumption as to who is an employee as follows: "A person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present: the manner in which the person works is subject to the control or direction of another person; the person's hours of work are subject to the control or direction of another person; in the case of a person who works for an organisation, the person is a part of that organisation; the person has worked for that other person for an average of at least 40 hours per month over the last three months; the person is economically dependent on the other person for whom that person works or renders services; the person is provided with tools of trade or work equipment by the other person; or the person only works for or renders services to one person." It is unfortunate to note that this presumption as well as "the resultant shift in the burden of proof to employers to rebut the presumption, has not been incorporated into the structures of the UIA" (Olivier MP and Van Kerken ET "Unemployment insurance" in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 436).

categories of the atypical workers and the informal economy workers.³³⁰ In addition, South Africa could consider the following general measures for extending unemployment insurance: progressive extension of access to unemployment insurance to new categories of currently excluded workers;³³¹ adapting the current unemployment insurance scheme so as to facilitate partial or voluntary participation of the self-employed as well as other categories of persons working in the informal economy;³³² improving the administrative capacity of the current unemployment insurance scheme (particularly in areas such as compliance and enforcement, contributions collection, maintenance of contributors' records and financial management);³³³ launching of educational and awareness campaigns to enhance

³³⁰ Section 51(1) of the BCEA provides the Minister of Labour with the discretion to issue a sectoral determination establishing basic conditions of employment for (unorganised) employees in a sector and area. More recently, the *Sectoral Determination 11: Taxi Sector 2005* (the *Determination*) brought the South African taxi sector (see clause 34(1) of the *Determination* for the definition of the 'taxi sector') within the ambit of the unemployment insurance scheme. It should be stressed that even before the *Determination*, there were taxi sector employers and employees who were supposed to be covered under the unemployment insurance scheme as far back as 1988. The now repealed *Wage Determination 452 for the Road Transportation Trade in Certain Areas* of July 1988 subjected employees of the minority of owners who owned more than ten vehicles to the UIA (Barrett J *Organizing in the Informal Economy: A Case Study of the Minibus Taxi Industry in South Africa* (International Labour Office (2003)) 10-11). The mere fact that the aforementioned sectoral determination of 1988 was limited to each owner of more than ten vehicles excluded many individuals in the employment of owners of less than ten vehicles from the ambit of the unemployment insurance scheme. Sectoral determinations are undoubtedly a useful vehicle through which unemployment insurance can be extended to the excluded and marginalised persons who eke a living in the informal sector. This is particularly so in cases where employers and their employees are easily identifiable. Nonetheless, sectoral determinations have their shortcomings. For example, they extend unemployment insurance in a piece-meal fashion. The issue is "it is left to a political office-bearer [the Minister of Labour] to adopt measures if and when he/she deems it appropriate to do so, and not to parliament to regulate coverage extension in the law itself" (Olivier MP and Mpedi LG "The extension of social protection to non-formal sector workers – experiences from SADC and the Caribbean" (2005) 19 *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht* (ZIAS) 144 at 157).

³³¹ See Van Ginneken W "Extending Social Security: Policies for Developing Countries" (2003) 142 *International Labour Review* 277 at 287, Reynaud E *The Extension of Social Security Coverage: The Approach of the International Labour Office* (ILO (2002)) 4 and 8, ILO *Social Security: Issues, Challenges and Prospects* (ILO (2001)) 60-63, Beattie R "Social protection for all: But how" (2000) 139 *International Labour Review* 129 at 135-139 and Bailey C "Extending the range of social protection" in ILO *Reflections on Reform Strategies for Social Protection in English-Speaking African Countries* (ILO (2000)) 33 at 64-66.

³³² See Beattie R "Social protection for all: But how" (2000) 139 *International Labour Review* 129 at 139-142, Bailey C "Extending the range of social protection" in ILO *Reflections on Reform Strategies for Social Protection in English-Speaking African Countries* (ILO (2000)) 33 at 68-70 and Van Langendock J "The social protection of the unemployed" (1997) 50 *International Social Security Review* 29 at 34.

³³³ Van Ginneken W "Extending Social Security: Policies for Developing Countries" (2003) 142 *International Labour Review* 277 at 287, Reynaud E *The Extension of Social Security Coverage: The Approach of the International Labour Office* (ILO (2002)) 4 and Bailey C "Extending the range of social protection" in ILO *Reflections on Reform Strategies for Social Protection in English-Speaking African Countries* (ILO (2000)) 33 at 66-68.

- awareness and understanding about the operation of unemployment insurance;³³⁴ and designing a benefit package or launching an alternative unemployment insurance scheme appropriate to the needs and contributory capacity of the excluded and marginalised categories of workers.³³⁵
- (b) Employees employed for less than 24 hours per month. The UIA does not apply to employees employed for less than 24 hours per month with a particular employer, and their employers.³³⁶ The basis of this exclusion, it appears, is “to avoid cumbersome and cost-ineffective administration of contributions.”³³⁷ The disadvantage of this provision is that “a person who works for various employers for short monthly periods, remains excluded even though he or she may be fully, or nearly fully, employed.”³³⁸
- (c) Employees who receive remuneration under a learnership agreement registered in terms of the *Skills Development Act*³³⁹ and their employers are not covered by the UIA and UICA.³⁴⁰ The exclusion of this group is unfortunate since they fell under the ambit of the previous *Unemployment Insurance Act*.³⁴¹ Furthermore, it should not pose a problem to bring this group within the scope of coverage of the unemployment insurance scheme as learners are generally employed for mostly 1 to 2 years.³⁴² In addition, fixed-term employees are covered under the South African unemployment insurance scheme.

³³⁴ Van Ginneken W “Extending Social Security: Policies for Developing Countries” (2003) 142 *International Labour Review* 277 at 287 and Reynaud E *The Extension of Social Security Coverage: The Approach of the International Labour Office* (ILO (2002)) 4.

³³⁵ See Van Ginneken W “Extending Social Security: Policies for Developing Countries” (2003) 142 *International Labour Review* 277 at 287, Reynaud E *The Extension of Social Security Coverage: The Approach of the International Labour Office* (ILO (2002)) 4 and Bailey C “Extending the range of social protection” in *ILO Reflections on Reform Strategies for Social Protection in English-Speaking African Countries* (ILO (2000)) 33 at 70-71.

³³⁶ S 3(1) of the UIA.

³³⁷ Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 443.

³³⁸ *Ibid.*

³³⁹ Act 97 of 1998.

³⁴⁰ S 3(1)(b) of UIA and s 4(1)(b) of UICA.

³⁴¹ See s 2 of the *Unemployment Insurance Act* 30 of 1966.

³⁴² Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 438.

- (d) Employers and employees in the national and provincial spheres of government. The exclusion of these employees is based on the assumption that the risk of unemployment is low or non-existent for them.³⁴³ This assumption has since proved to be flawed. As Van Langendonck puts it: “[The exclusion of civil servants] seems reasonable enough, since those persons usually enjoy lifetime appointments, so that the risk of unemployment seems to be non-existent for them. It should be pointed out, however, that guarantees against dismissal also exist in the private sector for certain categories of workers. Why should the same not apply to the public sector? Moreover, a lifetime appointment is not a 100 per cent guarantee against loss of employment. In the public sector, one can still be dismissed, e.g. for disciplinary reasons, following a prescribed procedure. This may be rare, but the persons concerned should certainly be protected against the loss of earnings and the loss of social protection which could result from it. And finally, public-sector workers should enjoy, in the same way as their fellows in the private sector, the right to leave their job if they have good reason to do so. Nobody should be compelled to stay in the same occupation for life, not even in the public service. This right would be of a theoretical nature for all but those enjoying independent means of existence if, by leaving, people risked losing their income and their social protection for an indefinite period. For that matter, unemployment protection is necessary as a matter of principle, including in the public sector.”³⁴⁴ The job security afforded to the South African civil servants is not as adequate as it is assumed to be.³⁴⁵ The risk of unemployment for private sector workers is often not greater than that of civil servants in South Africa.³⁴⁶ In addition, it is doubtful if the exclusion of civil servants

³⁴³ See, for example, Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 438 and ILO *Unemployment Insurance Schemes* (ILO (1955) 75-76.

³⁴⁴ Van Langendonck J “The social protection of the unemployed” (1997) 50 *International Social Security Review* 29 at 33-34.

³⁴⁵ See, for example, Pressly D “State to cut jobs” – accessed at <http://www.sundaytimes.co.za>.

³⁴⁶ There is no significant difference between the employment protection afforded to civil servants and other employees as both are largely subject to the same dismissal law contained in Chapter VIII of the LRA (Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 438). Furthermore, the administrative law protection available to civil servants (see Olivier MP “Labour relations in the public service” in *LAWSA Vol 13: Labour Law* (Butterworths

from the UIF is constitutionally tenable.³⁴⁷ Furthermore, there are unemployment protection instruments (such as the *Employment Promotion and Protection against Unemployment Convention*) which permit the exclusion of civil servants from the ambit of the unemployment insurance scheme. However, the exclusion of civil servants is allowed (e.g. by the aforesaid instrument) only in a situation where these employees have their employment guaranteed up to the normal retirement.³⁴⁸ In light of the preceding discussion, it is recommended that inclusion of civil servants be given priority. South Africa could, for example, consider incorporating civil servants into the current unemployment insurance scheme,³⁴⁹ establishing a public-service specific scheme, allowing civil servants to contribute on their own (even though this could be a candidate for a constitutional challenge), or making an arrangement (like in Belgium) whereby civil servants contribute their 1% of their salaries to the UIF while the state repays the Fund for paid out benefits on a pay-as-you-go basis.³⁵⁰

(2001)) 458-512) does not contribute much to their protection since it is primarily focused on principles of natural justice and validity (Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 438).

³⁴⁷ As Olivier and Van Kerken (Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 439-440) point out: “There are, Constitutionally speaking, several fundamental rights which come into play when the exclusion of public servants from the UIF is considered – for example, the right to fair labour practices, the right to equality, and the right to have access to social security. The Constitutional Court already made it clear [in *SA National Defence Union v Minister of Defence* 1999 20 ILJ 2265 (CC)] that the exclusion of (a particular category of) civil servants from a specific law would still entitle them to challenge the statutory restrictions constitutionally, on the basis that a fundamental right has allegedly been infringed. The implication is that the limitation of any of the fundamental rights referred to above must satisfy the limitation criteria contained in section 36 of the Constitution. In terms of this the limitation must be contained in a law of general application; the limitation must also be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. One of the issues that a court must consider in this regard, is the question whether a legitimate (governmental) purpose of sufficient importance is being served by the limitation. The argument that by not including/covering public servants the state will be able to do more in terms of social security for the poor, does not, in itself, constitute a legitimate government purpose of sufficient importance. Such an approach mixes and confuses the role of the state as employer and its role as provider of social security for the indigent. It also creates all sorts of unnecessary imbalances.”

³⁴⁸ This international law framework is crucial in the light of s 39(1)(b) of the Constitution which directs courts to consider international law when interpreting fundamental rights contained in the Constitution.

³⁴⁹ The problem with this option is that “[t]he State may feel unable on fiscal grounds to contribute to the scheme at the same rate as private employers...” This could be circumvented, for example, by arranging that “public servants contribute their 1% of their salaries to the Unemployment Insurance Fund while the state repays the [Unemployment Insurance] Fund for paid out benefits on a pay-as-you-go basis” (Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 441).

³⁵⁰ Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 441.

- (e) Persons who enter South Africa for the purpose of carrying out a contract of service, apprenticeship or learnership within the Republic if upon the termination thereof the employer is required by law or by contract of service, apprenticeship or learnership, as the case may be, or by any other agreement or undertaking, to repatriate that person, or that person is so required to leave South Africa.³⁵¹ The exclusion of this group of persons as found in the present UIA can be traced to the previous UIA. The exclusion of this category of workers raises problems of both a constitutional and international law nature. The UIA treatment of different categories of fixed-terms contract workers is inconsistent. Fixed-term contract workers are covered under the unemployment insurance scheme.³⁵² On the other hand, non-citizen fixed-term contract workers, who are required to return to their home countries at the end of their contracts of employment, are excluded from the ambit of the UIA. This differential treatment of non-citizens could be challenged as discriminatory on the basis of nationality.³⁵³ Viewed from an international law perspective, the exclusion of non-citizen fixed-term contract workers is in breach of, among others, the ILO Conventions. The ILO Conventions require member states to treat non-citizens (non-citizen fixed-term contract workers) on the same basis as citizens in social security matters, including unemployment insurance.³⁵⁴ South Africa has ratified the *Unemployment Convention*.³⁵⁵ This Convention requires South Africa to make arrangements with other ratifying countries so as to ensure that non-citizens from such countries who are employed in South Africa are eligible for the same rate of

³⁵¹ It should be kept in mind that: “national laws, and often also international instruments, invariably differentiate between permanent residents, temporary residents, migrant workers, refugees, asylum-seekers and illegal non-citizens. The interplay between immigration, termination of service and social security laws is crucial to the understanding of the status of non-citizen workers...The overall conclusion to be drawn is that the stronger the immigration status, the better the access to social security” (Olivier MP and Guthrie R “Extending employment injury and disease protection to the non-formal sector and non-citizen workers: The quest for innovative approaches” Paper presented at the 7th International Conference on Work Injuries Prevention, Rehabilitation and Compensation, Hong Kong, 27-29 June 2006).

³⁵² S 16(1)(a)(i) of the UIA.

³⁵³ See Olivier MP *et al* “Constitutional issues” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 49 at 98-99. Also see, generally, *Larbi-Odam v Member of the Executive Council for Education (North West Province)* 1997 12 BCLR 1655 (CC).

³⁵⁴ See, for example, the *Migration for Employment (Revised) Convention* 97 of 1949 and the *Equality of Treatment (Social Security) Convention* 118 of 1962.

³⁵⁵ ILO Convention 2 of 1919.

(unemployment insurance) benefit as that available to local workers.³⁵⁶ The absence of these arrangements in South Africa leads one to the conclusion that South Africa is in violation of its international obligations.³⁵⁷ To remedy this situation, South Africa should include non-citizen fixed-term contract workers within or exclude all fixed-term workers from the ambit of its unemployment insurance scheme.

2.2.3. Unemployment benefits and conditions of eligibility

The UIA makes provision for five different types of benefits for unemployment arising from loss of employment, namely: unemployment benefits, illness benefits, maternity benefits, adoption benefits and dependants benefits.³⁵⁸ As in many insurance schemes,³⁵⁹ access to these benefits is subject to certain qualifying conditions. Apart from complying with the qualifying conditions, which are discussed below, a contributor is, in accordance with section 14(a) of the UIA, not entitled to benefits for any period that the contributor was benefiting from a monthly pension from the State³⁶⁰ (for example, an old-age grant provided in accordance with the *Social Assistance Act* 13 of 2004) or any benefit from the Compensation Fund.³⁶¹ This appears to be aimed at avoiding the so-called ‘double-dipping’ – that is benefiting twice from separate public funds for one condition.³⁶² Despite that, the UIA is not always consistent in its endeavour to prevent ‘double dipping.’ For example, “it provides that

³⁵⁶ Article 3 of the *Unemployment Convention* 2 of 1919.

³⁵⁷ Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 442.

³⁵⁸ With the exception of domestic workers the unemployment legislation does not provide benefits for partial unemployment. This is unfortunate for the reason that the predecessor to the current legislation (see s 35(11) of the *Unemployment Insurance Act* 30 of 1966) made provision for the payment of benefits for partial unemployment. In addition, article 10(2)(a) of the *Employment Promotion and Protection against Unemployment Convention* require ratifying member states to extend protection to the loss of earnings due to partial unemployment. Also see article 10(3) of the *Employment Promotion and Protection against Unemployment Convention*. Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 449.

³⁵⁹ The fact the entitlement to benefits is subject to the payment of contributions to the UIF underscores the insurance nature of the scheme. The UIA has done away with the requirement that contributions must have been made for a certain period of time. Accordingly, this renders the scheme accessible to more persons whose employment is terminated (Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 445).

³⁶⁰ S 14(a)(i) of the UIA.

³⁶¹ S 14(a)(ii) of the UIA. The Compensation Fund is a Fund established in terms of the *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

³⁶² In the case of unemployment insurance it means receiving unemployment benefits while at the same time receiving income from another public fund such as the Compensation Fund.

the entitlement to unemployment, illness and adoption benefits may not be reduced by the payment of maternity in terms of the UIA.”³⁶³ In addition, “it does not prohibit “double-dipping” in respect of other public funds such as the Road Accident Fund.”³⁶⁴

A contributor is also not entitled to benefits for any period that the contributor was drawing benefits from any unemployment fund or scheme established by a council under section 28(g) or section 43(1)(c) of the *Labour Relations Act*.³⁶⁵ This has unintended consequences:

“The effect of this provision is that, although employers and employees who are involved in a council scheme remain obliged to contribute to the UI Fund, unemployed contributors will have to forfeit their (periodic) benefits which they had expected to be entitled to under the Fund. This provision is likely to discourage councils from arranging for unemployment benefits on this basis and it is likely that councils will discontinue their unemployment schemes – at least to the extent that periodic payments are envisaged, since these will impose a double burden and yield no advantages. It is submitted that it is unfair to impose an obligation to contribute to the statutory scheme and yet refuse entitlement to benefits for the mere reason that there is an entitlement under another scheme. One could also question the wisdom of excluding contributors from receiving benefits in terms of the UIF system if there is a council agreement to pay benefits. Why should an employee and his or her employer not be allowed to make additional occupational-based provision? This leaves one with a further anomaly: if the employee has made private provision for the contingency of unemployment, payment of unemployment benefits is not forfeited. One has great difficulty in understanding the discrepancy between occupational-based (council) payments and private payments.”³⁶⁶

According to section 14(b) of the UIA, a contributor is barred from benefiting from the fund if he fails to comply with the prescribed provision of the UIA or any other law relating to unemployment. Furthermore, a contributor is not entitled to benefits if he or she is suspended from receiving benefits.³⁶⁷

³⁶³ Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 433.

³⁶⁴ *Ibid.*

³⁶⁵ S 14(a)(iii) of the UIA.

³⁶⁶ Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 433.

³⁶⁷ S 14(c) of the UIA. In accordance with s 36(1) of the UIA, a Commissioner has a discretion to suspend a contributor or dependant, for a period of up to five years, from receiving benefits if he discovers that such contributor or dependant made a false statement in an application for benefits, submitted a fraudulent application for benefits, failed to inform a claims officer of the resumption of work during the period in respect

2.2.3.1. Unemployment benefits

These are unemployment benefits for the loss of work. Unemployment benefits are provided subject to conditions:

- (a) An unemployed contributor is entitled to unemployment benefits for any period of unemployment lasting for more than 14 days.³⁶⁸ This period is calculated from the date of unemployment.³⁶⁹ The 14 days period stipulated in the UIA seems “to be in excess of what is assumed reasonable in international law.”³⁷⁰ For example, the *Employment Promotion and Protection against Unemployment Convention* requires that the payment of benefit in cases of full unemployment should begin only after the expiry of a waiting period which may not exceed seven³⁷¹ and in certain circumstances (such as where a declaration of a temporary exception is made in accordance with article 5 of the *Employment Promotion and Protection against Unemployment Convention*) ten³⁷² days.
- (b) The reason for the unemployment must be due to, *inter alia*, the following: the termination of the contributor’s contract of employment by the employer or the dismissal of the contributor. Based on the foregoing reasons which both deal with dismissal, it is clear that persons who retired, resigned or deserted are not entitled to unemployment benefits.³⁷³ The underlying policy consideration is to prevent an

of which benefits were being paid, of failed to comply with a written demand issued in terms of s 35(2) of the UIA.

³⁶⁸ S 16(1) of the UIA.

³⁶⁹ S 15(1) of the UIA. The date of unemployment may, however, be a date prior to the application. For this to happen the claims officer must be satisfied that any delay in making the application was caused by circumstances which are beyond the contributor’s control (15(2) of the UIA). This is an improvement of a provision by the previous UIA (s 7(a) of the *Unemployment Insurance Act 30 of 1966*) which provided that a “period of unemployment shall not be deemed to have commenced until the contributor has lodged an application.”

³⁷⁰ Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 445.

³⁷¹ Article 18(1) of the *Employment Promotion and Protection against Unemployment Convention*.

³⁷² Article 18(2) of the *Employment Promotion and Protection against Unemployment Convention*.

³⁷³ Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 445.

individual from relying on a public fund if he or she is the cause of the reason(s) that resulted in the loss of earnings.³⁷⁴ These reasons are in compliance with the provision of the *Employment Promotion and Protection against Unemployment Convention*. In accordance with this Convention, unemployment benefits may be refused, withdrawn, suspended or reduced to the extent prescribed when it has been determined by the competent authority that the person concerned had deliberately contributed to his or her own dismissal;³⁷⁵ or the person concerned has left employment voluntarily without just cause.³⁷⁶ It is interesting to note that the UIA does not stipulate the reasons for the termination of the contributor's contract of employment by the employer. This implies that the "employee will be entitled to benefits even where the dismissal occurred as a result of misconduct on the part of the employee."³⁷⁷

Furthermore, the reason for the unemployment must be due to the ending of a contributor's fixed-term contract. This provision is criticised for the reason that it may be regarded as being in violation of the insurance principle underlying an insurance scheme as "the coming to an end of the contract is, under normal circumstances, a given, and not a risk which may not materialise."³⁷⁸ In addition, the reason for the unemployment must be due to insolvency in accordance with the *Insolvency Act*.³⁷⁹ Lastly, the reason for the unemployment must be due to (in the case of a domestic worker) the termination of the contributor's contract of employment by the death of the employer of the contributor.³⁸⁰ This provision is to be welcomed – particularly when one considers the personal nature of the employment relationship between the domestic worker and the employer (in the case of a natural person) which legally comes to an end with the passing away of the employer. It should also be

³⁷⁴ Olivier MP and Van Kerken ET "Unemployment insurance" in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 445 and Calitz K *et al* "Unemployment benefits" in Olivier MP *et al* (eds) *Social Security Law: General Principles* (Butterworths (1999)) 281 at 292.

³⁷⁵ Article 20(b) of the *Employment Promotion and Protection against Unemployment Convention*.

³⁷⁶ Article 20(c) of the *Employment Promotion and Protection against Unemployment Convention*.

³⁷⁷ Olivier MP and Van Kerken ET "Unemployment insurance" in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 446.

³⁷⁸ *Ibid.*

³⁷⁹ Act 24 of 1936.

³⁸⁰ S 16(1)(a) of the UIA.

- recalled that the death of either party to a contract of employment terminates the contract. Death renders the deceased party incapable of performance.
- (c) The contributor must lodge an application in accordance with the prescribed requirements. An application for unemployment benefits must be lodged at an employment office within a six months period. The Commissioner may, however, condone late application if a just cause is shown for such condonation.³⁸¹
 - (d) The contributor must be registered as a work-seeker with the labour centre established under the *Skills Development Act*.³⁸² The labour centres provide advice or counsel workers on career choices, assesses work-seekers for entry or re-entry into the labour market, and refer work-seekers to employers.³⁸³
 - (e) The contributor must be capable of and available for work. This condition is in line with the purpose of a state-run unemployment insurance scheme³⁸⁴ and it is recognised by the *Social Security (Minimum Standards) Convention* 102 of 1952 as well as the *Employment Promotion and Protection against Unemployment Convention*.³⁸⁵ According to Olivier and Van Kerken ‘capable to work’ means “a person is sufficiently able-bodied and able-minded to perform work.”³⁸⁶ The overall consequence of imposing the ‘ability to work’ condition is that “if an employee is without work because of sickness or another form of incapacity, or if he [or she] is sick or otherwise incapacitated at the time of filing his [or her] claim, he [or she] is

³⁸¹ S 17 of the UIA.

³⁸² Act 97 of 1998.

³⁸³ See ss 1 and 23(2) of the *Skills Development Act*. Also see paragraph 2.3.4.4. in chapter 3.

³⁸⁴ That is “to serve as a tie-over for a period during which a person has temporarily lost his or her job and consequently the ability to earn” (Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 447).

³⁸⁵ Article 20 of the *Social Security (Minimum Standards) Convention* 102 of 1952 and article 10(1) of the *Employment Promotion and Protection against Unemployment Convention*. It should be pointed out that the *Employment Promotion and Protection against Unemployment Convention* (article 10(1)), unlike the UIA, requires that there must be an inability to obtain suitable employment and that the unemployed person must actually seek work.

³⁸⁶ Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 447.

ineligible for unemployment benefit.”³⁸⁷ Benefits for the incapacity to work should in any event be provided under other social security schemes specifically dealing with risks such as sickness. Nevertheless, the South African unemployment insurance system does not automatically prevent a contributor who becomes ill while drawing unemployment benefits from benefiting. As a matter of fact, such unemployed contributor remains entitled to benefits as long as the claims officer is satisfied that the illness is not likely to prejudice the contributor’s chance of getting a job.³⁸⁸ As regards the ‘availability for work’, “a claimant may be considered as available for work when his [or her] personal circumstances are such that he [or she] is in a position to accept without delay the offer of a suitable job.”³⁸⁹

The South African unemployment insurance system does allow, under certain circumstances, the prevention of contributors from receiving unemployment benefits. For example, an unemployed contributor who fails to report at the times and dates stipulated by the claims officer can be barred from drawing unemployment benefits.³⁹⁰ The same applies to an unemployed contributor who unreasonably refuses to undergo training and vocational counselling for employment.³⁹¹ The claims officer has the discretion to impose a penalty of up to a maximum of thirteen weeks during which no benefits may be paid to contributor if the contributor concerned refuses without good cause to accept appropriate, available work or undergo appropriate training or vocational counselling while in receipt of unemployment benefits.³⁹² The UIA is not consistent in dealing with the question of the consequences of the contributor’s refusal, without good cause, to undergo appropriate training or vocational training: “Whilst section 18(2) merely visits the unemployed person with a bar of receiving benefits for a period of thirteen weeks, section 16(2)(b) provides that the contributor is not at all entitled to unemployment benefits. The only real

³⁸⁷ ILO *Unemployment Insurance Schemes* (ILO (1955)) 99.

³⁸⁸ S 16(3) of the UIA.

³⁸⁹ ILO *Unemployment Insurance Schemes* (ILO (1955)) 102.

³⁹⁰ S 16(2)(a) of the UIA.

³⁹¹ S 16(2)(b) of the UIA. Article 69(h) of the *Social Security (Minimum Standards) Convention* allows the suspension of an unemployment benefit where a person concerned fails to make use of employment services placed at his or her disposal.

³⁹² S 18(2) of the UIA.

difference, so it seems, is that the exclusion from receiving benefits (as opposed to the 13 weeks bar) would become applicable if there is a refusal to undergo training and vocational counselling *under any scheme approved by the Director-General*. However, the blanket exclusion from receiving benefits apparently does not apply where the unemployed person refuses to accept suitable unemployment. It would appear that there is no justification for drawing these distinctions which make little sense...” (italics in the original).³⁹³

2.2.3.2. Illness benefits

For the purpose of illness benefits, the UIA directs that the period of illness should be determined from the date the contributor ceases to work on account of the illness.³⁹⁴ The entitlement to illness benefits accrues to a contributor if such contributor is unable to perform work as a result of the illness, fulfils the prescribed requirements and applies for illness benefits in accordance with the prescribed requirements.³⁹⁵ A contributor may not draw illness benefits if the period of illness is less than 14 days and for any period during which such contributor is entitled to unemployment benefits or adoption benefits, or unreasonably refuses or fails to undergo medical treatment or to carry out the instructions of a medical practitioner, chiropractor or homeopath.³⁹⁶ In addition, the illness benefit may not be more than the remuneration the contributor would have received if the contributor had not been ill.³⁹⁷ It is interesting to note that the UIA, unlike its predecessor, neglected to proscribe entitlement to illness benefits by a contributor who is unemployed due to an illness arising from his or her own misconduct.³⁹⁸ This is regrettable for the reason that this proscription is in conformity with the principle that contributors who deliberately contribute towards their unemployment should not draw any benefits.³⁹⁹

³⁹³ Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 447-448.

³⁹⁴ S 19(1) of the UIA.

³⁹⁵ S 20(1) of the UIA.

³⁹⁶ S 20(2) of the UIA.

³⁹⁷ S 21(2) of the UIA.

³⁹⁸ S 36(6)(c) of the UIA 30 of 1966.

³⁹⁹ See paragraph 2.2.2.3. in chapter 4.

2.2.3.3. Maternity benefits

A pregnant contributor is entitled to the maternity benefits contemplated in the UIA for any period of pregnancy or delivery and the period thereafter.⁴⁰⁰ The maximum period of maternity leave in respect of which benefits may be paid is 17,32 weeks⁴⁰¹ or four months.⁴⁰² Prior to the deletion of section 24(2) of the UIA by the *Unemployment Insurance Amendment Act*,⁴⁰³ the benefit could be reduced to the difference between any maternity leave paid to the contributor in terms of any law, collective agreement or contract of employment for the period of illness, and the maximum benefit payable in terms of the UIA. Subsequent to the *Unemployment Insurance Amendment Act*, the UIA now permits ‘double-dipping’ in the case of maternity benefits. However, the maternity benefit may not be more than the remuneration the contributor could have received had she not been on maternity leave.⁴⁰⁴

A contributor who has a miscarriage during the third trimester or bears a stillborn child is entitled to a maximum maternity benefit of six weeks after the miscarriage or stillbirth.⁴⁰⁵ It should be noted that the days of benefits⁴⁰⁶ in respect of which a contributor is entitled to in accordance with the UIA may not be reduced by the payment of maternity benefits.⁴⁰⁷ The entitlement to maternity benefits is subject to the condition that the pregnant contributor is not prevented from receiving the benefits⁴⁰⁸ and that an application is made in accordance

⁴⁰⁰ S 24(1) of the UIA.

⁴⁰¹ S 24(4) of the UIA.

⁴⁰² According to s 25 of the BCEA, “an employee is entitled to at least four consecutive months’ maternity leave.”

⁴⁰³ Act 32 of 2003.

⁴⁰⁴ S 24(3) of the UIA.

⁴⁰⁵ S 24(5) of the UIA.

⁴⁰⁶ The following method is used to calculate the days of benefits that a contributor is entitled to: Step 1 – Determine total number of days that an employee was employed as a contributor in the four-year period immediately preceding the date of application for benefits in terms of chapter 3 of the UIA (i.e. the chapter making provision for the claiming of benefits) Step 2 – Divide total number of days by 52 multiplied by seven and disregard any fraction of the resultant figure. Step 3 – Subtract from this amount any days benefits (excluding maternity benefits) received in the four-year period immediately preceding the date of application for benefits in terms of chapter 3 of the UIA. Step 4 – The resultant figure determines the days of benefits that a contributor is entitled to (section 13(5) of the UIA).

⁴⁰⁷ S 13(5) of the UIA.

⁴⁰⁸ See s 14 of the UIA as well as the discussion in paragraph 2.2.3. in chapter 3.

with the prescribed requirements.⁴⁰⁹ The procedure for the application for and payment of maternity benefits is in essence the same as that of illness benefits.⁴¹⁰

It should be pointed out that maternity benefits (and other family related benefits such as adoption benefits) are, in many countries of the world,⁴¹¹ provided for under a separate family protection related scheme. These benefits, it is opined, stretch the financial capacity of the UIF. To this end, it is suggested that maternity (as well as the adoption) benefits be removed completely from the unemployment insurance scheme and be catered for by a separate family benefits scheme. The advantage of this approach is that “non-formal sector maternity situations could in principle be covered, and that the UIF be made to focus on the provision of benefits in the event of more or less unavoidable unemployment, and the prevention and combating of unemployment, as well as the promotion of integrative labour market policies.”⁴¹²

2.2.3.4. Adoption benefits

These benefits are available to a contributor who adopts a child. Only one contributor of the adopting couple is entitled to adoption benefits.⁴¹³ This possibility is, however, subject to the condition that the child has been adopted in accordance with the *Child Care Act*,⁴¹⁴ the period during which the contributor was not working was spent caring for the child, the adopted child is below the age of two and the application is made in accordance with the prescribed requirements.⁴¹⁵ Entitlement to adoption benefits commences on the date at which the court has granted an adoption order.⁴¹⁶ The benefit may not exceed the remuneration the contributor could have earned if the contributor had been at work.⁴¹⁷ In addition, the

⁴⁰⁹ S 24(1) of the UIA. See s 25 of the UIA for the procedure to be followed when applying for maternity benefits.

⁴¹⁰ S 25 of the UIA.

⁴¹¹ E.g. Germany and India. See paragraphs 2.2.2. and 3.2. in chapter 5.

⁴¹² Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 451.

⁴¹³ S 27(1) of the UIA.

⁴¹⁴ Act 74 of 1983.

⁴¹⁵ S 27(1) of the UIA.

⁴¹⁶ S 27(2) of the UIA.

⁴¹⁷ S 27(4) of the UIA.

application for adoption benefits must be lodged within six months after the date of the order of adoption. Otherwise the Unemployment Insurance Commissioner has the discretion to accept late application if good cause shown.⁴¹⁸

2.2.3.5. Dependant's benefits

These are benefits which are available in the first place to the surviving spouse or a life partner of a deceased contributor. For a surviving spouse or a life partner to benefit, he or she must lodge an application in accordance with the prescribed requirements.⁴¹⁹ This must be done within six months of the death of the contributor. Similarly to other benefits, the Commissioner may condone late applications on good cause shown.⁴²⁰ Dependant's benefits, which are an equivalent of unemployment benefits which could have been paid to the deceased contributor had he or she been alive,⁴²¹ are not limited to the surviving spouse or life partner. A dependant child of the deceased contributor is also entitled to dependant's benefits. This is, however, subject to the condition that there is no surviving spouse or life partner or the surviving spouse or life partner has not lodged an application for the benefits within six months of the contributor's death.⁴²² Provisions relating to the application for and payment of dependant's benefits are, to a large extent, similar to that of other unemployment benefits.⁴²³

The UIA neglected to define 'surviving spouse', 'life partner' and 'dependant'. In the wake of an abundance of conflicting definitions of what is or should be a 'dependant' in our social security laws (e.g. the *Pension Funds Act* 24 of 1956 and the *Compensation for Occupational Injuries and Diseases Act* 130 of 1993)⁴²⁴ it is submitted that it is regrettable that the interpreters of the UIA should be left with the task of double-guessing the intention of the

⁴¹⁸ S 28 of the UIA.

⁴¹⁹ S 30(1) of the UIA.

⁴²⁰ *Ibid.*

⁴²¹ S 30(3) of the UIA.

⁴²² S 30(2) of the UIA.

⁴²³ See s 31 and s 32 of the UIA.

⁴²⁴ The definition of 'dependant' contained in s 1 of the *Pension Funds Act* 24 of 1956 includes both legal and factual dependants. Whereas it is not the case with that definition contained in s 1 of the *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

drafters. Eventually, this leads to exclusions and marginalisation of certain groups and/or categories of persons – particularly those persons who were in fact dependant on the deceased for maintenance. The UIA version of ‘dependant’ does not seem to incorporate these dependants. It is not clear whether the concept of ‘life partner’ includes same-sex life partners or not. Furthermore, it is difficult to tell “whether and, if so, to what extent a life partner or spouse who was married to the deceased employee in terms of customary or religious law would qualify as a beneficiary if there was also a civil marriage or another wife subsisting at the time of the employee’s death.”⁴²⁵ There is dire need for clarity on this issue. To this end it is recommended that the UIA should follow the *Pension Funds Act*’s approach and incorporate *de facto* dependants, alongside the legal dependants, in its definition of dependants.

Another point of criticism regarding the dependants benefits is that the UIA ranks beneficiaries. A surviving spouse and a life partner are ranked above a dependant child.⁴²⁶ This is based on the assumption that the surviving spouse or life partner will care for the surviving dependant child or children. While this may be the case, in certain instances such an assumption fails the dependant child or children. The problem is that although the dependant child or children may be that or those of the deceased contributor it or they may not belong to the surviving spouse or life partner.⁴²⁷ Extra-marital children and offspring of a previous marriage(s) or relationship(s) are the case in point.⁴²⁸ To remedy this situation, it is suggested that a provision be made for, where necessary, *pro rata* division of dependants benefits.

⁴²⁵ Olivier MP “Death and survivors’ benefits” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 301 at 306.

⁴²⁶ A ‘child’ in terms of s 1(1) of the UIA means a person who is under the age of 21 years and includes any person under the age of 25 who is a learner and who is wholly or mainly dependent on the deceased.

⁴²⁷ Olivier MP “Death and survivors’ benefits” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 301 at 307.

⁴²⁸ *Ibid.*

2.2.4. Protection of benefits

Benefits claimed in terms of the UIA are protected in various ways. They may not be assigned, attached by the order of court⁴²⁹ or set off against a debt.⁴³⁰ Furthermore, benefits paid to contributors and their dependants may not be taxed.⁴³¹ In addition, any benefits erroneously provided must be repaid to the UIF.⁴³² These provisions are in conformity with the purpose of paying benefits which is to provide an income during a period in which a contributor suffers a loss of earnings.⁴³³ Accordingly this purpose would not be served if unintended persons were to benefit from the unemployment insurance scheme.

2.2.5. Calculation of benefits

According to the UIA, for the purpose of calculating the benefits payable to a contributor, the daily rate of remuneration of a contributor must be determined. If the contributor is paid on a monthly basis, multiplying the monthly remuneration by 12 and dividing it by 365 will determine the daily rate. In the situation of weekly paid contributors, multiplying the weekly remuneration by 52 and dividing it by 365 will determine the daily rate of remuneration of a contributor.⁴³⁴ Foreseeing the difficulty posed by contributors whose remuneration fluctuated from time to time, the UIA directs that in such a situation, the calculation must be based on the average remuneration of the contributor concerned over the previous six months.⁴³⁵ In accordance with Schedule 3 of the UIA a contributor who earned R10 000 per month will be entitled to a maximum of 30.78% of the previous earnings (i.e. R3 077,62) and a contributor who earned R 150 per month will be entitled to a maximum of 58.64% of the previous earnings (i.e. R87.96 per month).⁴³⁶ Consequently, it could be opined that the monetary value

⁴²⁹ The only exception in which benefits can be attached by court is relating to maintenance of dependants, including a former spouse, of the contributor. S 33(1)(b) of the UIA.

⁴³⁰ S 33(1) of the UIA.

⁴³¹ S 34 of UIA.

⁴³² S 35 of the UIA.

⁴³³ Calitz K *et al* "Unemployment benefits" in Olivier MP *et al* (eds) *Social Security Law: General Principles* (Butterworths (1999)) 281 at 301.

⁴³⁴ S 13(1) of the UIA.

⁴³⁵ S 13(2) of the UIA.

⁴³⁶ See Olivier MP and Van Kerken ET "Unemployment insurance" in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 429.

of the benefits is low. Section 13(3) of the UIA set the rate of accrual of entitlement to benefits at one day's benefit for every completed six days of employment as a contributor subject to a maximum accrual of 238 days benefit in the four year period immediately preceding the date of application for benefits. This, it is opined, is in accordance with the purpose of unemployment insurance. That is "to tide unemployed workers over relatively short periods while they are without earnings."⁴³⁷ As remarked earlier, this is based on the assumption that unemployment is transient. Consequently, there is a need for an unemployment assistance programme to provide cover to those persons who exhaust unemployment insurance benefits.

2.2.6. Funding

The South African unemployment insurance system is sustained mainly through contributions from employers and their employees. From the employee perspective, only those who qualify as contributors contribute towards the UIF.⁴³⁸ According to the UIA, a 'contributor' means a natural person who is or was employed, to whom the Act applies and who can satisfy the commissioner that he or she has made contributions for purposes of the UIA.⁴³⁹ Employees who qualify as contributors, together with their employers, each

⁴³⁷ Blaustein SJ and Craig I *An International Review of Unemployment Insurance Schemes* (The W.E. Upjohn Institute for Employment Research (1977) 73.

⁴³⁸ S 1 of the UIA.

⁴³⁹ Consequently, employees who do not fit within the definition of 'contributor' are excluded from participating in the unemployment insurance scheme. Nonetheless, the Minister of Labour has the discretion to declare any category or class of persons, or any person employed in a specified business or area as contributors (s 69 of the UIA and s 81(1)(b) of the BCEA). Furthermore, the UIF Commissioner "may deem a person to be a contributor...if it appears that the person should have received benefits in terms of [the UIA] but, because of circumstances beyond the control of that person, is not entitled to benefits" (s 45 of the UIA). This provision could be useful in protecting persons whose employers might have neglected to pay contributions to the UIF on their behalf (Olivier MP and Van Kerken ET "Unemployment insurance" in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 437). Notwithstanding the foregoing, the requirement contained in the definition of 'contributor' that an employee must satisfy the UIF Commissioner that he or she has contributed to the UIF is regrettable. As Olivier and van Kerken (Olivier MP and Van Kerken ET "Unemployment insurance" in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 437) put it: "...it is unfair to place the onus on an employee to satisfy the Commissioner that he or she has made contributions. A large proportion of employees never receive proof that deductions were made, for instance because they receive their remuneration without an accompanying written statement indicating that UIF contributions were made. Those employees who do have proof of deductions will normally have no manner of determining whether the deducted amounts (and the employer's contribution) were in fact remitted to the Commissioner concerned. Employers in respect of whom contributions were remitted to the SARS Commissioner may be unable to establish from SARS the position, as

contribute one per cent of the employee's salary which is paid over to the UIF.⁴⁴⁰ The ILO *Social Security (Minimum Standards) Convention* sets standards that the financing of unemployment benefits schemes must comply with. According to this Convention, the cost of the benefits provided under an unemployment insurance scheme and the cost of the administration of such benefits should be borne collectively by way of insurance contributions or taxation or both.⁴⁴¹ The manner of financing the benefits must avoid hardship to persons of limited means.⁴⁴² In addition, the total of the insurance contributions borne by the employees protected should not exceed 50 per cent of all the financial resources allocated to pay benefits and administrative costs.⁴⁴³ The financing of the South African unemployment insurance scheme appears to be in compliance with these provisions.

2.2.7. Adjudication and enforcement

The *Employment Promotion and Protection against Unemployment Convention* and the *Social Security (Minimum Standards) Convention* provide an unemployment benefit claimant with a right to challenge the refusal, withdrawal, suspension or reduction of benefit.⁴⁴⁴ According to the *Employment Promotion and Protection against Unemployment Convention* unemployment benefits claimants have the right to present a complaint to the body administering the benefit scheme and to appeal thereafter to an independent body. A person entitled to benefits in accordance with the UIA may appeal to a Regional Appeals Committee of the Unemployment Insurance Board (UIB) if that person is aggrieved by the decision of the Commissioner to suspend his or her right to benefits or a claims officer relating to the payment or non-payment of benefits.⁴⁴⁵ The decision of the appeals committee of the UIB

a result of the secrecy provisions in terms of section 4 of the Income Tax Act. In addition, it is likely that a large proportion of contributors can expect little co-operation from their ex-employers in obtaining proof of payment (for example where the employment was terminated on a less than cordial note). There will certainly be a lack of assistance from the ex-employer where the latter had defaulted by not paying contributions to the commissioner concerned."

⁴⁴⁰ The state normally carries the burden of any deficits that may accrue.

⁴⁴¹ Article 71(1) of the *Social Security (Minimum Standards) Convention*.

⁴⁴² *Ibid.*

⁴⁴³ Article 71(2) of the *Social Security (Minimum Standards) Convention*.

⁴⁴⁴ Article 27 of the *Employment Promotion and Protection against Unemployment Convention* and article 70(1) of the *Social Security (Minimum Standards) Convention*.

⁴⁴⁵ S 37(1) of the UIA.

can be challenged at the National Appeals Committee.⁴⁴⁶ The Labour Court has jurisdiction in all matters involving the UIA with the exception of those that amount to an offence.⁴⁴⁷ These remedies should not be seen as the end of possible routes that an aggrieved party can take to challenge a decision not to provide him or her with benefits or any unfair or illegal treatment that may be perpetrated by the Fund. An aggrieved party may in principle invoke pure administrative law remedies such as review in the ordinary courts of the country. The South African unemployment insurance scheme's adjudication mechanisms are in line with those set out in the *Employment Promotion and Protection against Unemployment Convention* and the *Social Security (Minimum Standards) Convention*.

As regards enforcement, the UIA makes provision for several enforcement mechanisms. Labour inspectors, when employers fail to comply with its provisions, secure an undertaking by the employer to comply with UIA⁴⁴⁸ or issue a compliance order.⁴⁴⁹ An employer who is aggrieved by the labour inspector's compliance order may object against such order by referring the dispute for resolution to the Director-General.⁴⁵⁰ A compliance order may, upon application by the Director-General, be made an order of the Labour Court.

2.2.8. Unemployment insurance: Some observations

Unlike their predecessors, the recent unemployment insurance statutes have propelled the unemployment insurance scheme a step further towards complying with the Constitution and international law standards in the field of unemployment protection. The current unemployment insurance scheme has, for example, a wider scope of coverage and the UIF is in a financial sound position. Despite that, the South African unemployment insurance scheme is far from perfect. This assertion stems chiefly from the conspicuous absence of measures to (re)integrate the unemployed into the labour market;⁴⁵¹ the absence of partial

⁴⁴⁶ S 37(2) of the UIA.

⁴⁴⁷ S 66 of the UIA.

⁴⁴⁸ S 38 of the UIA.

⁴⁴⁹ S 39(1) of the UIA.

⁴⁵⁰ S 40 of the UIA.

⁴⁵¹ The present set of unemployment insurance laws stripped away the Minister of Labour's power to introduce schemes to combat unemployment which was provided for in the unemployment insurance law that preceded them.

unemployment benefits (except in the case of domestic workers); and the continued exclusion of civil servants, certain categories of the atypical workers, the informal economy workers, certain categories of migrant workers and learners. South Africa should as a matter of priority extend unemployment protection to the aforesaid categories of excluded workers.⁴⁵² In addition, there are some definitional problems (particularly as regards dependants (e.g. ‘surviving spouse’)) and inconsistencies in the manner in which the UIA deals with, for example, “what the consequences would be if the contributor refuses, without reason, to undergo appropriate training or vocational training.”⁴⁵³ Furthermore, the South African unemployment insurance scheme covers contingencies such as maternity and adoption. It is suggested that these risks be covered under a separate benefits system (i.e. family benefits systems) as they stretch the financial capacity of the UIF and divert the focus of the UIF from pressing issues such as preventing and combating unemployment.

2.3. Public programmes

2.3.1. Public works programmes

Public works programmes are not new in South Africa. In the past, the government invoked them to deal with the poor white problem.⁴⁵⁴ In recent times, when the African National Congress’ government came into office, in its policy framework document dubbed *The Reconstruction and Development Programme: A Policy Framework* (the RDP),⁴⁵⁵ it voiced its staunch support for public works programmes as a tool to fight joblessness and poverty in South Africa. The RDP directed the newly democratically elected government to establish job creation programmes. While supporting the need for a strong welfare system, it strongly discourages the introduction of what it calls ‘handouts’ for the unemployed.⁴⁵⁶ The RDP is

⁴⁵² See, for a discussion on possible routes that may be adopted in an attempt to extend coverage, paragraph 2.2.2.2. in chapter 3.

⁴⁵³ Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003) 415 at 447.

⁴⁵⁴ See, for example, Abedian I and Standish B “Poor whites and the role of the state: The evidence” (1985) 52 *South African Journal of Economics* 141.

⁴⁵⁵ *The Reconstruction and Development Programme: A Policy Framework* (1994) – accessed at <http://www.polity.org.za/html/govdocs/rdp/rdp.html>.

⁴⁵⁶ The government stance on a ‘handout system’ as encapsulated in the RDP can still be distilled from its practices a decade after the RDP has been published. The strong objection by the government against the

premised on the view that all South Africans, irrespective of whether they are based in rural or urban areas, should have the opportunity to participate in the economic life of South Africa.⁴⁵⁷ In addition, the RDP requires all short-term job creation programmes to be multi-goaled by ensuring adequate income and labour standards; link into local, regional or national development programmes; and promote education, training, community capacity and empowerment.⁴⁵⁸ The co-ordinated national public works programme, as foreseen by the RDP, should endeavour to: provide education and training and involve communities while producing technically sound assets,⁴⁵⁹ maximise the involvement of women and youth in the poorest rural households and most deprived regions, and give priority to job creation and training, target the most marginalised sectors of the society and where possible encourage and support self-employment.⁴⁶⁰

A variety of public works programmes as envisaged by the RDP have seen the light of day. These programmes include, among others, the National Public Works Programme (NPWP),⁴⁶¹ Working for Water Programme⁴⁶² and other government projects and/or

introduction of the Basic Income Grant is the case in point. The government is of the view that instead of providing 'handouts' to the unemployed and other vulnerable members of the society it should rather strengthen its public works programmes. This is a decision it stands by amidst strong opposition from organised labour (particularly COSATU) as well as other sectors of the civil society. See Tabane R and Hafajee F "Less welfare, more jobs" – accessed at <http://allafrica.com/stories/20030807096.html>, McCord A "An overview of the performance and potential of Public Works Programme in South Africa" Paper prepared for the DPRU/Tips Forum, 8-10 September 2003, Johannesburg and Bernstein A and Dagut S "Get cracking on labour-intensive projects" (Article extracted from "Sowetan" 23 April 2003) – accessed at <http://www.fnf.org/News/CDE-Article.htm>.

⁴⁵⁷ *The Reconstruction and Development Programme: A Policy Framework* (1994) – accessed at <http://www.polity.org.za/html/govdocs/rdp/rdp.html>.

⁴⁵⁸ *Ibid.*

⁴⁵⁹ The idea is to empower communities in the process so that they can contribute to their own governance.

⁴⁶⁰ *The Reconstruction and Development Programme: A Policy Framework* (1994) – accessed at <http://www.polity.org.za/html/govdocs/rdp/rdp.html>.

⁴⁶¹ The National Public Works Programme (NPWP) may be divided into two programmes, namely the Community Based Public Works Programme (CBPWP) and the Construction Industry Development Programme (CIDP). The CBPWP is targeted at the poorest of the poor in rural communities. Projects implemented through this programme address(ed) a variety of hardships faced by the rural poor such as lack of infrastructure, skills shortage and weak institutional support for development (Department of Public Works "The Community Based Public Works Programme" – accessed at <http://www.publicworks.gov.za>). The CIDP, on the other hand, is aimed at developing the construction industry. To give some teeth to this important programme, the *Construction Industry Development Board Act* 38 of 2000 was enacted to implement an integrated strategy for reconstruction, growth and development of the construction industry (the preamble of the *Construction Industry Development Board Act*). This Act recognises and appreciates, *inter alia*, the important role played by the construction industry in the South African economy in providing the much needed physical infrastructure; the stability and structural problems facing the construction industry; the project-specific and complex environment the construction industry operates in; the frustration which the development of the

programmes.⁴⁶³ In addition, the government has recently introduced the Extended Public

emerging sector has to face on account of its inability to access opportunities, finance and credit, as well as vocational and management training; the limitation of investment in physical infrastructure and the need to promote effective public sector spending and private sector investment as well as to interpret investment trends; the direct impact of the construction on communities and the public at large; and the Government's vision of a construction industry development strategy that promotes stability, fosters economic growth and international competitiveness, creates sustainable employment and addresses historic imbalances as it generates new construction industry capacity (the preamble of the *Construction Industry Development Board Act*). Several programmes have, within the auspices of the CIDP, seen the light of day and have started to yield some fruits. In view of the high prevalence of the HIV/Aids in the construction industry, awareness programmes have been launched to educate and awaken awareness to all industry stakeholders on HIV/Aids and related issues, promoting appropriate and effective ways of managing the pandemic in the construction industry, and creating a safe working environment (Department of Public Works "The Construction Industry Development Programme" – accessed at <http://www.publicworks.gov.za>). Another programme worth mentioning is the Emerging Contractor Development Programme. This programme is aimed at paving a way for emerging enterprises by overcoming constraints they normally face in the construction industry. It is also aimed at ensuring that black and women contractors emerge into the mainstream construction economy (Department of Public Works "The Construction Industry Development Programme" – accessed at <http://www.publicworks.gov.za>).

⁴⁶² Working for Water Programme (WWP) is a multi-departmental programme (led by the Department of Water Affairs and Forestry, Department of Environmental Affairs and Tourism, and Department of Agriculture) which aims to "sustainably control invading alien species, optimise the potential use of natural resources, through the process of economic empowerment and transformation" (Department of Water Affairs and Forestry "Working for Water Programme" – accessed at <http://www.dwaf.gov.za>). Apart from the removal of alien plants which consume more water, this programme has an assortment of social development aspects which are aimed at poverty alleviation. This is evident from the programme targets. In 2002, for example, the programme aimed to create 18 000 jobs per annum, for the previously unemployed individuals; allocate 60% of these jobs to women; allocate 20% of the jobs to youth (persons under the age of 23 years); allocate 2% (minimum amount) of jobs to disabled persons; ensure every worker receives a minimum average of two days of training per month; ensure every project has a functional steering committee; ensure every worker receives an hour of HIV/Aids awareness training per quarter; and ensure every project allows for access to childcare facilities (Department of Water Affairs and Forestry "Working for Water Programme" – accessed at <http://www.dwaf.gov.za>). From these targets, one can deduce that the programme (in addition to job creation and poverty alleviation) aspires to embrace the socially excluded categories of persons such as women, people with disabilities; develop skills; and (most importantly) promote HIV/Aids awareness among the rural poor. In addition to the foregoing, the Working for Water Programme has a secondary industries component which uses the wood cleared for the manufacturing of products such as crafts, furniture, mulch, charcoal, and smoke chips. This component of the programme is ideal because it provides an opportunity for the transfer of skills as well as the development of small and micro-enterprises. It is, in addition, good for the development of entrepreneurship among the historically disadvantaged communities (Department of Water Affairs and Forestry "Working for Water: Secondary industries" – accessed at <http://www.dwaf.gov.za>).

⁴⁶³ Various government departments, either individually or in partnership with other departments are involved in a variety of labour intensive programmes and/or projects. These programmes and/or projects are in most instances linked to broader public works programmes of the government. Among these programmes one would find a number of departmental poverty relief projects. These projects came about after the introduction of a poverty relief fund by the Department of Finance. Government departments were invited to apply for funding which is aimed at departmental poverty relief projects. To gain access to these funds departments had to comply with a variety of requirements. They had to indicate that the poverty relief projects for which funding is sought: relief poverty in poorest areas of provinces, in particular rural areas; provide for infrastructure in poor areas; assist in human development and in building capacity; provide jobs and, in doing so, involve the community; favourably impact on households in which single women are the main breadwinners; produce food and provide access to markets for the distribution thereof; and seek to make projects sustainable in the long term (Parenzee P "A gendered look at the Poverty Relief Funds" – accessed at <http://www.idasa.org.za/bis/docs/budgetBrief129.htm>). These funding criteria, as pointed out by Parenzee, "reflect an attempt to encourage a well targeted approach to addressing poverty and unemployment and one that

Works Programme (EPWP). It is foreseen that through the EPWP, which has been hailed as the government's flagship job-creation project, between R15 billion and R20 billion will be injected into South Africa's economy over the next five years.⁴⁶⁴ Programmes which were in existence prior to the commencement of the expanded programme, such as various poverty relief programmes,⁴⁶⁵ now fall under the umbrella of the EPWP.⁴⁶⁶ The highly successful Working for Water and associated programmes are foreseen as projects that would sustain the EPWP.⁴⁶⁷

is also sensitive to the vulnerabilities that women, in particular, face" (Parenzee P "A gendered look at the Poverty Relief Funds" – accessed at <http://www.idasa.org.za/bis/docs/budgetBrief129.htm>). When the number of departments receiving funding from the Poverty Relief Fund increased over years, so did the overall amount allocation (see National Treasury's Budget Review 1998-2003 – all accessed at <http://www.finance.gov.za>). However, the Poverty Relief Fund has (since its inception) been marred by a range of problems. Underspensing of poverty relief funds by departments proved to be a major problem for a majority of government departments. See, for example, Committee of Inquiry into a Comprehensive System of Social Security for South Africa "Committee Report no: 8 – Poverty, social assistance and the Basic Income Grant" 298 – accessed at <http://www.sarpn.org.za/CountryPovertyPapers/SouthAfrica/taylor/report8.php>, Parenzee P "A gendered look at the Poverty Relief Funds" – accessed at <http://www.idasa.org.za/bis/docs/budgetBrief129.htm>, Skewiya Z "Statement on the poverty relief programme" – accessed at <http://www.gcis.gov.za/media/cabinet/000329mwelf.htm> and "Special Allocation for Poverty Relief Infrastructure Investment and Jobs Summit Projects: An overview" – accessed at <http://www.projectliteracy.org.za/tmpl/Documents/Julia%20de%20Bruyn.doc>). Other notable problems include: "overlapping (and in some cases duplication) of projects by different departments, Department funding projects which are at best marginally related to their core function and skills, the leakage of substantial proportions of funding to non-poor, the effectiveness of spending in addressing poverty, lack of programme management capacity at all levels and inadequate degree of integration and co-ordination amongst the departments implementing projects" (Committee of Inquiry into a Comprehensive System of Social Security for South Africa "Committee Report no: 8 – Poverty, social assistance and the Basic Income Grant" 298 – accessed at <http://www.sarpn.org.za/CountryPovertyPapers/SouthAfrica/taylor/report8.php>). A recent in-depth assessment of the poverty relief allocations found that despite the problem of underspending in the initial years, poverty relief projects contributed significantly to, *inter alia*, income generating activities and support for the development of Small, Medium and Micro Enterprises (SMMEs) in communities (moreover, the assessment revealed that all projects created short term and permanent jobs and provided training (National Treasury *Budget Review 2004* (Government Printers (2004)) 135).

⁴⁶⁴ "Public works' million-job target" – accessed at http://www.southafrica.info/ess_info/sa_glance/social_delivery/publicworks.htm.

⁴⁶⁵ For example, the Land Care, Faranani-Pushing Back the Frontiers of Poverty, People and Parks, Coastal Care, Sustainable Land-based Livelihoods, Cleaning up South Africa, and Growing a Tourism Economy programmes. "Public works' million-job target" – accessed at http://www.southafrica.info/ess_info/sa_glance/social_delivery/publicworks.htm.

⁴⁶⁶ Streak J and Van der Westhuizen C *Fitting the Pieces Together: A Composite View of Government's Strategy to Assist the Unemployed in South Africa 1994-2004* (IDASA (2004)) 34 at fn 48, Phillips S "The Expanded Public Works Programme" (2004) 3 *Service Delivery Review* 20 at 24 and "Public works' million-job target" – accessed at http://www.southafrica.info/ess_info/sa_glance/social_delivery/publicworks.htm.

⁴⁶⁷ "Public works' million-job target" – accessed at http://www.southafrica.info/ess_info/sa_glance/social_delivery/publicworks.htm.

2.3.2. Expanded Public Works Programme

The Extended Public Works Programme (EPWP) is one of the government's short-to-medium term strategies aimed at addressing unemployment.⁴⁶⁸ The goals of EPWP are to create one million temporary jobs (at least 40% women, 30% youth and 2% disabled) in the first five years of the programme,⁴⁶⁹ promote economic growth⁴⁷⁰ and promote sustainable development. The core objectives of the EPWP are threefold. That is job-creation, skills development⁴⁷¹ and improved social services.⁴⁷² Several sectors have been identified as having potential for creating EPWP employment opportunities. These sectors are the infrastructure sector, environmental and cultural sector, social sector, and economic sector.

Employment conditions under the EPWP are governed by the *Code of Good Practice for Special Public Works Programme*⁴⁷³ and the *Learnership Determination for Unemployed Learners*.⁴⁷⁴ The EPWP is funded through the Department of Public Works.⁴⁷⁵ The

⁴⁶⁸ *Guidelines for the Implementation of Labour Intensive Infrastructure Projects under the Expanded Public Works Programme* Notice 554 of 2004 (Gazette No. 26180) ii. See, for a short history of the EPWP, Phillips S "The Expanded Public Works Programme" (2004) 3 *Service Delivery Review* 20 at 24.

⁴⁶⁹ Extended Public Works Programme *Creating Opportunities towards Human Fulfilment: Second 2004/05 Quarterly Report* – <http://www.epwp.gov.za/reprot/2q04.htm>.

⁴⁷⁰ Extended Public Works Programme "Creating opportunities towards human fulfilment" – <http://www.epwp.gov.za/index.htm>.

⁴⁷¹ It should be recalled that training is a crucial part of the EPWP. Clause 15 of the *Code of Good Practice for Special Public Works Programme* obliges every Special Public Works Programme to have a clear training programme in place that strives to: (a) ensure programme managers are aware of their training responsibilities; (b) ensure a minimum of 2 days training for every 22 days worked; (c) ensure a minimum of the equivalent of 2% of the project budget is allocated to funding the training programme; (d) ensure sustainable training through certification; (e) balance quality of life, functional and entrepreneurship training; (f) balance formal training with structured work place learning; (g) equip workers with skills that can be used to secure other employment opportunities; and (h) identify possible career paths available to workers exiting the Special Public Works Programme.

⁴⁷² Zuma J "Address at the launch of the Extended Public Works Programme" Nombika High School, Durban, 28 August 2004 – accessed at <http://www.anc.org.za/ancdocs/history/zuma/2004jz0828.html>.

⁴⁷³ No. R64 of 25 January 2002 (Gazette No. 23045). The purpose of the *Code of Good Practice for Special Public Works Programme*, which must be read in conjunction with a Ministerial Determination for special public works programmes issued by the Minister of Labour, is to provide good practice guidelines to all stakeholders involved in Special Public Works Programmes in respect of working conditions, payment and rates of pay, disciplinary and grievance procedures as well as promote uniformity between different Special Public Works Programme within South Africa (Clause 2 of the *Code of Good Practice for Special Public Works Programme*). The *Code of Good Practice for Special Public Works Programme* applies to all employers and to all workers hired to perform in elementary occupations in the Special Public Works Programme (Clause 3 (1) of the *Code of Good Practice for Special Public Works Programme*).

⁴⁷⁴ See Department of Labour Sectoral Determination 5: Learnerships – accessed at http://www.labour.gov.za/legislation/sectoral_display.jsp?id=5411.

Department of Public Works has an obligation to adhere to the *Guidelines for the Implementation of Labour Intensive Infrastructure Projects under the Expanded Public Works Programme*.⁴⁷⁶ Notwithstanding the foregoing, it should be borne in mind that the EPWP involve all spheres of government⁴⁷⁷ and state-owned enterprises.⁴⁷⁸ They, in addition, look to the private sector for additional support.⁴⁷⁹

The EPWP is relatively new. It is, for this reason, hardly surprising that little in-depth evaluation of the EPWP has seen the light of day. Even so, several issues deserve special mention. Firstly, the EPWP 2004/05 *Quarterly Report* (the report) notes with concern that: “There is still a need to correct the tendency for the EPWP to be seen as a Department of Public Works (DPW) programme rather than as a programme of the whole of the government; hence the need to intensify efforts to overcome widespread resistance to the use of more labour intensive methods in infrastructure.”⁴⁸⁰ The report charges further that: “This resistance is based on the perception that labour-intensive methods are more difficult to manage, take longer, are more costly, and result in inferior quality products.”⁴⁸¹ On a positive note, the report documents the success currently enjoyed by certain environmental sector programmes and certain labour intensive programmes in some provinces.⁴⁸² As a result, it

⁴⁷⁵ “Public works’ million-job target” – accessed at http://www.southafrica.info/ess_info/sa_glance/social_delivery/publicworks.htm.

⁴⁷⁶ Notice 554 of 2004 (Gazette No. 26180). These guidelines are comprehensive and instrumental in identifying the theoretical aims, objectives and methodology of the EPWP. Govindjee A “South Africa’s expanded public works programme in comparison with employment creation mechanisms in India’s five year plans” Paper presented at the CROP and CICLASS Law and Poverty VI Workshop, Johannesburg, South Africa, 26-28 January 2005.

⁴⁷⁷ The government of South Africa is constituted as national, provincial and local spheres of government (s 40 of the Constitution).

⁴⁷⁸ “Public works’ million-job target” – accessed at http://www.southafrica.info/ess_info/sa_glance/social_delivery/publicworks.htm.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ Extended Public Works Programme *Creating Opportunities towards Human Fulfilment: Second 2004/05 Quarterly Report* – <http://www.epwp.gov.za/reprot/2q04.htm>.

⁴⁸¹ *Ibid.*

⁴⁸² *Ibid.* These programmes include, among others, the Zibambe Programme in Kwa-Zulu Natal and the Gundo Lashu Programme in Limpopo. Zibambe programme is a programme initiated by the Kwa-Zulu Natal Department of Transport in 2000 which maintains the province’s rural road network while providing poor rural households with a regular income (“Public works’ million-job target” – accessed at http://www.southafrica.info/ess_info/sa_glance/social_delivery/publicworks.htm). The Gundo Lashu project is a programme which is modelled along the lines of the Zibambe programme launched in Limpopo in 2004 for rural road rehabilitation (“Public works’ million-job target” – accessed at http://www.southafrica.info/ess_info/sa_glance/social_delivery/publicworks.htm). See, for further reading about

foresees a possibility of expanding this programme provided further funds could be made available.⁴⁸³ Secondly, the EPWP has a limited impact on employment creation. The one million jobs which the programme intends to achieve by 2010 is only a fraction of the total number of the unemployed in South Africa.⁴⁸⁴ Furthermore, recent research findings show that, “the wage income supplied to beneficiaries may have a favourable impact on the non-income dimension of poverty (such as food and clothing), but it is unlikely to be large enough to push people above the poverty line.”⁴⁸⁵

2.3.3. Public works programmes: Some observations

Public works programmes are not unique to South Africa. They have been and are still being used in many parts of the world as an answer to persistent unemployment.⁴⁸⁶ What is interesting about the South African programme, however, is its broad ambition and multi-goaled approach.⁴⁸⁷ Even so, it has been demonstrated that public works programmes can

Zibambele Programme and Gundo Lashu Programme, Phillips S “The Expanded Public Works Programme” (2004) 3 *Service Delivery Review* 20 at 23.

⁴⁸³ *Ibid.*

⁴⁸⁴ Streak J and Van der Westhuizen C *Fitting the Pieces Together: A Composite View of Government's Strategy to Assist the Unemployed in South Africa 1994-2004* (IDASA (2004)) 37.

⁴⁸⁵ *Ibid.* See, generally, McCord A “Public works and overcoming under-development in South Africa” Paper presented at the Conference on Overcoming Under-development in South Africa's Second Economy, Pretoria, South Africa, 28-29 October 2004 – accessed at www.polity.org.za/pdf/PublicWorks.pdf.

⁴⁸⁶ See, for example, Culhane B *Public Works Programs: What are the Income Gains to the Poor?* (World Bank Poverty Lines Newsletter no. 9 (1997)), Subbarao K *Public Works as an Anti-poverty Program: An Overview of Cross-country Experience* (World Bank (1997)) – accessed at <http://www.worldbank.org/poverty/safety/pworks/pworks.pdf>, Stock E and De Veen J *Expanding Labor-Based Methods for Road Works in Africa* (World Bank Technical Paper no. WTP 347 (1996)), McCutcheon RT “Employment creation in public works – Labour-intensive construction in sub-Saharan Africa: The implications for South Africa” (1995) 19 *Habitat International* 331, Datt G and Ravallion M *Income Gains for the Poor from Public Works Employment: Evidence from two Indian Villages* (World Bank Living Standards Measurement Study Working Paper 100 (1994)), Mangum S *et al* *Strategies for Creating Transitional Jobs During Structural Adjustment* (World Bank Policy Research Working Paper WPS 947 (1992)), Ravallion M *et al* *Higher Wages for Relief Work Can Make Many of the Poor Worse Off: Evidence from Maharashtra's Employment Guarantee Scheme* (World Bank Policy Research Working Paper WPS 568 (1991)), Ravallion M “Reaching the rural poor through public employment: Arguments, evidence and lessons from South Asia” (1991) 6 *World Bank Research Observer* 153 and Ravallion M *Reaching the Poor Through Rural Public Employment: A Survey of Theory and Evidence* (World Bank Discussion Papers 94 (1990)).

⁴⁸⁷ Adato M and Haddad L *Targeting Poverty through Community-Based Public Works Programs: A Cross-Disciplinary Assessment of Recent Experience in South Africa* (IFPRI Discussion Paper 121) – accessed at <http://www.ifpri.org>.

make a significant inroad into certain social problems (such as poverty, unemployment and HIV/Aids) – but only to a limited extent.⁴⁸⁸

- (a) Firstly, it is true that South African public works programmes are gender sensitive and complement other measures aimed at addressing the gender imbalances of the past. Some programmes which are targeted at the construction industry, for example, are designed to assist women to find their way into the construction industry which is a historically male dominated industry. These efforts are important because, in most instances, women “generally spend their earnings from public works on basic household requirements.”⁴⁸⁹ In spite of the foregoing, a majority of public works programmes involve manual labour which may discourage women from participating. To encourage women to take part in these programmes, it is crucial that programmes are designed in such a way that they accommodate women. Physical infrastructure focused programmes definitely need to be blended with projects which are aimed at the creation of social infrastructure (e.g. Home Community Based Care and Early Childhood Development). To this end, the identification of the social sector as one of the opportunities for implementing the EPWP is to be welcomed.⁴⁹⁰
- (b) Secondly, public works programmes do not provide a long-term solution to the problem of unemployment. The problem is that “public work programmes, by their very nature, do not offer long term viable employment opportunities for the unskilled structurally unemployed.”⁴⁹¹ While it is appreciated that they are beneficial to the poor and perfect for avoiding a culture of welfare dependency,⁴⁹² it nonetheless follows that they, in a way, postpone the problem. As a temporary solution to social risks (such as unemployment and poverty), public works programmes are indeed

⁴⁸⁸ See, for example, DeJardin AK *Public Works Programmes, a Strategy for Poverty Alleviation: The Gender Dimension* (Issues in Development Discussion Paper 10 (1996)).

⁴⁸⁹ *Ibid.*

⁴⁹⁰ See the homepage of the Expanded Public Works Programme at <http://www.epwp.gov.za>. Also see Phillips S “The Expanded Public Works Programme” (2004) 3 *Service Delivery Review* 20.

⁴⁹¹ Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present Protecting the Future: Consolidated Report* (2002) 73.

⁴⁹² *Ibid* 74.

- important. Nevertheless, the government and all concerned cannot pin their hopes on them to deal with social risks indefinitely.
- (c) Thirdly, prospects of (re)integrating those who participate in the public works programme into the labour market remain low. In fact, some commentators have gone as far as concluding that “public jobs have no effect on individual re-employment probabilities in regular jobs”⁴⁹³ There is, indeed, a serious need for reinforcing measures in public works programmes that will facilitate the (re-)entry of its participants into the formal labour market. It remains to be seen, however, how the EPWP will fare in its endeavours to facilitate the (re-)entry of the unemployed into the formal labour market.
 - (d) In addition, there is the serious problem of targeting. A study by Adato and Haddad discovered that “there is little evidence of the targeting of public works to the poorest among the poor, whether within districts, municipalities, or communities.”⁴⁹⁴ They further point out that there are districts with extremely high unemployment and poverty rates with no labour intensive programmes while there are areas with low incidences of poverty and unemployment which boost close to four or even more projects.⁴⁹⁵ Discrepancies like these have a negative impact on what seems ideal, at least if implemented properly, in endeavours to ease the effect of unemployment on the poorest of the poor.
 - (e) Furthermore, there is possibility that existing workers could be displaced by persons employed in public works programmes. One of the primary aims of public works programmes is employment creation.⁴⁹⁶ For that reason, the displacement of existing workers (if this were to occur) could undermine the aforesaid objective.

⁴⁹³ Kraus F *et al* *Do Public Works Programmes Work?: Some Unpleasant Results from the East German Experience* (ZEW Discussion Paper no. 98-7 (1998)).

⁴⁹⁴ Adato M and Haddad L *Targeting Poverty through Community-Based Public Works Programs: A Cross-Disciplinary Assessment of Recent Experience in South Africa* (IFPRI Discussion Paper 121) – accessed at <http://www.ifpri.org>.

⁴⁹⁵ *Ibid.*

⁴⁹⁶ See paragraphs 2.3.1. and 2.3.2. in chapter 3.

- (f) Lastly, there is a risk that public works programmes could lure low-paid workers in the formal and informal economy workers.⁴⁹⁷ If this were to happen it could mean that “the programmes would no longer address the problem of unemployment as intended, but address primarily the poverty problem.”⁴⁹⁸

2.3.4. Skills development programme

2.3.4.1. Skills development programme: An overview

South Africa has a labour market in which extremes exist side by side. The huge demand for highly skilled people despite burgeoning unemployment among unskilled people is the case in point.⁴⁹⁹ This contrast emphasises the importance of (re)skilling people with labour market

⁴⁹⁷ Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present Protecting the Future: Consolidated Report* (2002) 73.

⁴⁹⁸ Olivier MP and Van Kerken E “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 421.

⁴⁹⁹ The tendency of extremes existing side by side is not unique to South Africa. Poverty and inequality, for example, segments South Africa into ‘two nations’ (i.e. the very rich and the very poor). One’s prospects in life (and in the labour market) are often shaped by the ‘nation’ he or she emanates from. Often those who originate from the very rich part of South Africa stand a better chance of acquiring good and labour market relevant skills (such as university training) as compared to their very poor counterparts (see, generally, Aliber M “Chronic poverty in South Africa: Incidence, causes and policies” (2003) 31 *World Development* 473, Van der Berg S “Education, poverty and inequality in South Africa” Paper presented at the Conference on Economic Growth and Poverty in Africa, Oxford, 18-19 March 2002, Naudé W and Jansen van Rensburg L “Understanding poverty as a human rights violation: The case of legal reform and local economic development in South Africa” Paper presented at the Conference on Economic Growth and Poverty in Africa, Oxford, 18-19 March 2002, Gilbert L and Walker L “Treading the path of least resistance: HIV/AIDS and social inequalities – a South African case study” (2002) 54 *Social Science & Medicine* 1093, Carter M and May J “Poverty, livelihood and class in rural South Africa” (2001) 27 *World Development* 1, Carter M and May J “One kind of freedom; Poverty dynamics in post-apartheid South Africa” (2001) 29 *World Development* 1987, Leibbrandt M and Woolard I “The labour market and household income inequality in South Africa: Existing evidence and new panel data” (2001) 13 *Journal of International Development* 689, Swartz L “Poverty, population dynamics and unemployment in South Africa, with reference to the four major racial groups” Paper presented at the Joint Population Conference, University of Pretoria, 2-4 October 2001, and McDonald S and Piesse J “Legacies of apartheid: The distribution of income in South Africa” (1999) 11 *Journal of International Development* 985). The history of the current extreme opposites in the labour market can, just like many other social inequities in South Africa, be traced back to apartheid (see Donald J *et al* “Racial differences in occupational status and income in South Africa, 1980 and 1991” (1996) 33 *Demography* 111, Nattrass N and Seekings J “Citizenship and welfare in South Africa: Deracialisation and inequality in a labour-surplus economy” (1997) 31 *Canadian Journal of African Studies* 452, Crankshaw O “Changes in the racial division of labour during the apartheid era” (1996) 22 *Journal of Southern African Studies* 633, Posel D “Whiteness and power in the South African civil service: Paradoxes of the apartheid state” (1999) 25 *Journal of Southern African Studies* 99, Frankel P “The politics of passes: Control and change in South Africa” (1979) 17 *Journal of Modern African Studies* 199, Longmore L “South Africa: A new Constitution?” (1959) 58 *African Affairs* 141, Sachs A “Towards the

oriented skills. It should also be noted that South Africa suffered a huge brain drain in recent years.⁵⁰⁰ This left a lacuna in the labour market. Accordingly, addressing the current skills shortage remains crucial. In its quest to (re)skill the South African population, the post-apartheid government promulgated two important pieces of legislation,⁵⁰¹ namely the *Skills Development Act* (hereafter the SDA)⁵⁰² and *Skills Development Levies Act* (hereafter SDLA).⁵⁰³ The SDA has been enacted chiefly to provide an institutional framework to devise and implement national, sector and workplace strategies to develop and improve the skills of the South African workforce; to provide for learnerships that lead to recognised occupational qualifications; to provide for the financing of skills development by means of a levy-grant scheme and a national Skills Fund; and to provide for and regulate employment services.⁵⁰⁴

reconstruction of South Africa" (1985) 12 *Journal of Southern African Studies* 49 and Kirov D "South Africa's skilled labour shortage – myth or reality" – accessed at <http://www.sba.muohio.edu/abas/2000/kirovda.pdf>.

⁵⁰⁰ See, for example, Crush J and Williams V (eds) *Counting Brain: Meaning Emigration from South Africa* (SAMP Migration Policy Brief No. 5 (2001)), Crush and Williams J (eds) *Thinking about Brain Drain in Southern Africa* (SAMP Migration Policy Brief No. 8) – accessed at <http://www.queensu.ca/samp/publications/policybriefs/brief8.pdf>, Meyer J *et al* *Assessing the South African Brain Drain: A Statistical Comparison* (DPRU Working Paper No. 00/40 (2000)), Myburgh A "Globalisation, labour mobility and the economics of emigration: The case of South Africa" TIPS 2002 Annual Forum, Muldersdrift – accessed at <http://www.queensu.ca> and Crush J (ed) *Losing our Minds: Skills Migration and the South African Brain Drain* (SAMP Migration Policy Series No. 18 (2000)).

⁵⁰¹ These two pieces of legislation ushered a new era of skills development in South Africa by repealing the *Manpower Training Act* 56 of 1981, *Guidance and Placement Act* 62 of 1981, *Local Government Training Act* 41 of 1985 and ss 78 to 87 of the *Telecommunications Act* 106 of 1996. See, for a discussion on training policies implemented under the former apartheid state, Kraak A "Training policies under late apartheid: The historical imprint of a low skills regime" in McGrath S *et al* (eds) *Shifting Understandings of Skills in South Africa: Overcoming the Historical Imprint of a Low Skills Regime* (HRSC Press (2004)) 46.

⁵⁰² Act 97 of 1998.

⁵⁰³ Act 9 of 1999. The SDLA, on the other hand provides largely for the imposition of a skills development levy (preamble of the *Skills Development Levies Act* (SDLA)). It sets out the financing framework for the skills development programmes. In general, every employer has a duty to pay a skills development levy (s 3 of the SDLA). The following are, however, exempted from paying the levy: any public service employer in the national or provincial sphere of government; any employer who is obliged to pay the levy and during any month, there are reasonable grounds for believing that the total amount of remuneration paid or payable by that employer to all its employees will not exceed R250 000 or such other amount as the Minister may determine; any religious or charitable institution; or any national or provincial public entity, if 80 per cent or more of its expenditure is defrayed directly or indirectly from funds voted by Parliament (s 4 of the SDLA). Employers (which are liable to pay the levy) have an obligation to register as employers for the levy purposes. According to s 20 of the SDLA: "Any person who – (a) fails to apply for registration for purposes of the levy; (b) fails to pay any levy on the date determined for payment thereof; (c) furnishes any false information in a statement or other document required in terms of this Act, knowing the information to be false; (d) fails to – (i) submit or deliver any statement or other document or thing; (ii) disclose any information; (iii) reply to or answer truly and fully, any questions put to him or her; or (iv) attend and give evidence; or (e) hinders or obstructs any person in carrying out his or her functions in terms of this Act, commits an offence and is liable on conviction to a fine or imprisonment for a period not exceeding one year." Non-payment or late payment of the levy may attract interest (s 5 of the SDLA). There is a default penalty (10 per cent of the unpaid amount) which is payable in addition to interest (s 12 of the SDLA).

⁵⁰⁴ Preamble of the SDA.

Section 2(1) of the SDA enunciates seven key issues as the purpose of the SDA; namely: developing the skills of the South African workforce (so as to improve the quality of life of workers, their prospects of work and labour mobility; improve productivity in the workplace and the competitiveness of employers; promote self-employment; and improve the delivery of social services); increasing the levels of investment in education and training in the labour market; encouraging employers to use the workplace as an active learning environment, provide employees with the opportunities to acquire new skills, provide opportunities for new entrants to the labour market to gain work experience, and employ persons who find it difficult to be employed; encouraging workers to participate in learnership and other training programmes; improving the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantaged through training and education; ensuring the quality of education and training in and for the workplace and assisting work-seekers to find work, retrenched workers to re-enter the labour market, and employers to find qualified employees; and providing and regulating employment services.⁵⁰⁵

It is clear from the foregoing that the SDA embraces active labour market policies and measures such as job search assistance, employment services, and assisting workers displaced in mass lay-offs to re-enter the labour market. In principle, the UIF is responsible for providing the unemployed persons (who contributed to the Fund) with the so-called passive labour market measures (i.e. measures aimed at providing income security such as unemployment benefits) whereas the institutional framework set by the SDA should provide active labour market measures to assist unemployed persons to (re-)enter the labour market. However, in practice the linkage between the provision of passive labour market measures and active labour market measures is not as streamlined as it should be. As pointed out

⁵⁰⁵ The SDA aims to achieve its purposes by establishing an institutional and financial framework which consists of the National Skills Authority (see Chapter 2 of the SDA for provisions relating to the establishment, functions, composition, constitution, and remuneration and administration of National Skills Authority), the National Skills Fund (s 27(1) of the SDA), a skills development levy-grant scheme, Sector Education and Training Authorities (SETAs) (chapter 3 of the SDA), labour centres, and the Skills Development Planning Unit (see s 22 of the SDA); encouraging partnership between the public and private sectors of the economy to provide education and training in and for the workplace; and co-operating with the South African Qualifications Authority (s 2(2) of the SDA). From a policy perspective, the SDA can be criticised for the reason that it focuses more on employment instead of unemployment policy in the sense that it makes provision for a broad framework intended at developing the skills of the country's labour force (Olivier MP and Van Kerken ET "Unemployment insurance" in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 417).

earlier, an unemployed contributor is obliged to register as a work-seeker with the labour centre before he or she can draw unemployment benefits. This provision serves as a bridge between the passive labour market measures contained in the UIA and the active labour market measures provided for by SDA. The same cannot be said about unemployed persons (particularly the long-term unemployed) who are not covered by the UIA as there is no general duty for unemployed persons to register as work-seekers. The absence of such a duty could be linked to the fact that there are no unemployment assistance benefits in South Africa which could be paired with the active labour market measures. Another point to be noted about the limited attempts to link passive and active labour market measures in South Africa is that: “It is unlikely that the statutory incentive to conduct training programmes in terms of the Skills Development Act will have a dramatic impact as far as preventing/combating unemployment and the re-integration of the unemployed are concerned.”⁵⁰⁶ The fact of matter is that, “[f]rom a statutory perspective these programmes have an employee bias, with the result that those who are unemployed or who work but are not regarded as employees in the statutory sense of the word, will largely still not benefit from skills development programmes.”⁵⁰⁷

2.3.4.2. Skills programmes

A ‘skills programme’ refers to a skills programme that: is occupationally based; when completed, will constitute a credit towards a qualification registered in terms of the National Qualifications Framework; uses training providers accredited by a body contemplated in section 5(1)(a)(ii)(bb) of the *South African Qualifications Authority Act* and complies with the prescribed requirements.⁵⁰⁸ Skills programmes which fit the foregoing definition may, subject to the availability of funds,⁵⁰⁹ be eligible for a grant from the SETA with jurisdiction or subsidy from the Director-General of Labour.⁵¹⁰

⁵⁰⁶ Olivier MP and Smit N *LAWSA Vol 13 (Part 2): Labour Law and Social Security Law* (Butterworths (2002)) par. 22.

⁵⁰⁷ *Ibid* fn 7.

⁵⁰⁸ S 20(1) of the SDA

⁵⁰⁹ S 20(3)(c) of the SDA.

⁵¹⁰ S 20(2) of the SDA. Before the SETA with jurisdiction can provide a grant or a Director-General can provide a subsidy to a skills programme, such a programme should, *inter alia*, comply with the requirements imposed by the SETA or Director-General (s 20(3)(a) of the SDA) and it must be in accordance with the sector

2.3.4.3. Education and training

The aims of the SDA and the SDLA relating to education (and training) should be viewed from the perspective that education⁵¹¹ is important for (un)employment protection. It equips individuals with a tool through which they can know about their (un)employment protection rights and *invoke, demand or protect* them when and where necessary.⁵¹² As pointed out by Asmal:⁵¹³

“Article ten of our Bill of Rights, as enshrined in our Constitution, affirms that ‘Everyone has inherent dignity and the right to have their dignity respected and protected.’ The prison of illiteracy is an immediate affront to this right, because language is a vital compass for intellectual navigation, for meaningful movement, within a constitutional order. The state issues its instructions – and confers its benefits – in written regulations, statutes and correspondence. Illiteracy, placing citizens to depend upon third party translators, is almost a form of serfdom. Apart from the right to dignity, which is the wellspring of all the other constitutional rights, illiteracy denies citizens these other rights themselves: ‘Everyone is equal before the law.’ But you cannot access the law if you do not understand it. ‘Everyone has the right to choose their profession freely.’ But if you are illiterate, you will draw water or hew wood as Bantu education intended; you will work with your hands rather than writing with them. You will lag even further behind in the literacy-driven digital economy of the internet... ‘Every citizen has the right to choose their profession freely.’ If slavery is the lack of choice, then illiteracy enslaves... ‘Everyone has the right to access to information [held by] the state.’ ‘Everyone has the right

skills development plan of the SETA or the national skills development strategy (s 20(3)(b) of the SDA). Funds made available or paid for a skills programme could be withheld or recovered if the SETA or the Director-General is of the opinion that the funds are not being used for the purpose for which they were made available, any term or condition of the funding is not complied with, or the SETA or the Director-General is not satisfied that the training is up to standard (s 20(6) of the SDA). Funding-related disputes can be referred to the Labour Court (s 21 of the SDA).

⁵¹¹ Section 29(1) of the Constitution entrenches education as a right and not a privilege by providing that: “everyone has the right to a basic education, including adult basic education; and to further education, which the State, through reasonable measures must make progressively available and accessible.” See, for an impression on obligations which flow from the right to education, Tomaševski K *Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable* (Right to Education Primers No. 3 (2001)). Also see Hénare J “The right to education: Setting the context” – accessed at <http://www.eip-cifedhop.org/english/publications/dossiersperda.html#1> and Babadji R “Legal foundations for the rights to education” – accessed at <http://www.eip-cifedhop.org/english/publications/dossiersperda.html#1>.

⁵¹² See Nowak M “The right to education” in Eide A *et al* (eds) *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff (1995)) 189 at 189.

⁵¹³ Speech by the then Minister of Education, Kader Asmal at the launch of the South African National Literacy Initiative, Midrand, Gauteng (26 June 2000) – accessed at http://education.pwv.gov.za/Media/Speeches_2000/June_2000/Sanli_Launch.htm

to just administrative action.’ ‘Everyone has the right to access to the courts.’ ‘Everyone has the right to basic education.’ No illiterate person may directly access any of these rights – they must remain dependent on literate guides to lead them; their citizenship is rendered almost vicarious; their autonomy is compromised. They are in important respects unable to leave behind the dependency that ought to change childhood wanes; they become ashamed, shy, [and] deferential.”

In addition, it may be argued that education is important in an (un)employment protection system because it serves (directly and/or indirectly) as a bridge that facilitates access to employment and, most importantly, social security.⁵¹⁴ Education is elemental to social integration, labour market and economic integration. This is primarily because “education enhances the earning potential of the poor, both in competing for jobs and earnings in a static labour market and as a source of growth and employment itself.”⁵¹⁵ Uneducated workers (as well as their families) are more vulnerable to social risks (such as unemployment, poverty and poor health) when compared to their educated counterparts. The key issue is that educated workers benefit from “at least three basic advantages over the less educated workers in the labour market: higher wages, greater upward mobility in income and occupation, and greater employment stability.”⁵¹⁶ In addition, educated workers find it easier to adjust to information age needs of the labour market than uneducated workers. Uneducated workers often rely on their physical power to discharge their employment duties – yesterday’s strong point which has become today’s weakness. This is indeed problematic in the sense that it is not easy to reintegrate this type of workers once they become redundant. The information age workplace is more technical than in the past and often requires mental power rather than physical power:

⁵¹⁴ The point is that “...many human rights can only be accessed through education, particularly rights associated with employment and social security. Without education, people are impeded from access to employment. Lower educational accomplishment routinely prejudices their career advancement. Lower salaries negatively affect their old-age security. Denial of the right to education triggers exclusion from the labour market and marginalization into the informal sector, which is accompanied by the exclusion from the labour market. Redressing the existing imbalance in life chances without the full recognition of the right to education is impossible” (Tomaševski K *Removing Obstacles in the Way to the Rights to Education* (Right to Education Primers No. 1 (2001)) 9.

⁵¹⁵ Van der Berg S “The role of education in labour market earnings, poverty and inequality” Paper presented at the DPRU/FES Conference on Labour Markets and Poverty in South Africa, Johannesburg, 15-16 November 2001.

⁵¹⁶ Mincer J *Education and Unemployment* (NBER Working Paper No. 3838 (1991)) 2.

“Education is vital: those who can compete best (with literacy, numeracy, and more advanced skills) have an enormous advantage in this faster paced world economy over their less well prepared counterparts...globalisation of markets and the factors that drive them – especially knowledge – is reinforcing these impacts. Global capital, moveable overnight from one part of the globe to another, is constantly seeking more favourable opportunities, including well-trained, productive, and attractively priced labour forces in market-friendly and politically stable business environments. Employers, seeing local markets more exposed to global competition, are requiring production processes that are much faster, ensure higher quality outputs more reliably, accommodate greater variety and continuous innovation, and cut costs relentlessly, as wafer-thin profit margins drive win-or-die outcomes. These pressures, in turn, are transforming the sorts of workers needed. Tomorrow's workers will need to be able to engage in lifelong education, learn new things quickly, perform more non-routine tasks and more complex problem solving, take more decisions, understand more about what they are working on, require less supervision, assume more responsibility, and – as vital tools to those ends – have better reading, quantitative, reasoning, and expository skills.”⁵¹⁷

To a certain extent, one may be tempted to argue that it is largely on account of little education (in a form of relevant skills or upgradeable level of education) that South Africa is stuck with structural unemployment. The little or no education predicament experienced by a majority of individuals often spirals down to their families. This means limited chances in life for their children. Failure to genuinely address on equitable basis educational needs (basic as well as tertiary) of the entire population invariably guarantees perpetual poverty and social exclusion.

2.3.4.4. Employment services⁵¹⁸

The SDA imposes a duty on the Director-General, subject to the laws governing the public service, to establish labour centres in the Department of Labour.⁵¹⁹ The main functions of

⁵¹⁷ World Bank *Education – Education Sector Strategy* (International Bank for Reconstruction and Development/World Bank (1999)) – accessed at http://www.logos-net.net/ilo/150_base/en/publ/pdf_06.htm.

⁵¹⁸ According to s 1 of the SDA ‘employment services’ means “the provision of the service of advising or counselling of workers on career choices either by the provision of information or other approaches; assessment of work-seekers for entry or re-entry into the labour market; or education and training; the reference of work-seekers to employers to apply for vacancies; or to training providers for education and training; assistance of employers by providing recruitment and placement services; advising them on the availability of work-seekers with skills that match their needs; advising them on the retrenchment of employees and the development of social plans; procuring for or providing to a client other persons to render services to or perform work for the client, irrespective of by whom those persons are remunerated; or any other prescribed employment service.”

labour centres are, *inter alia*, to: provide employment services for workers, employers and training providers, including improvement of such services to rural communities; register job-seekers; register vacancies and work opportunities; and assist prescribed categories of persons to enter special education and training programmes, to find employment, to start income-generating projects, and to participate in special employment programmes.⁵²⁰ Employment services are, however, not limited to the public sector. The Director-General has the discretion to register private persons who wish to provide employment services for gain.⁵²¹ The South African situation as regards employment services is compatible in some respects with international standards set by the ILO. The *Unemployment Convention* requires member states which ratify this Convention to “establish a system of free public employment agencies under the control of a central authority.”⁵²² As is apparent above, South Africa does comply with this requirement. South Africa is also required by the *Unemployment Convention* to endeavour to co-ordinate at a national scale the operations of public and private employment agencies where they exist.⁵²³ The *Private Employment Agencies Convention*, which South Africa is yet to ratify, requires member states to establish and periodically review conditions to promote co-operation between the public employment service and private employment agencies.⁵²⁴ Co-operation between the two agencies may, as in countries such as Poland, include the following: the exchange of databases on jobseekers, the promotion of a system of budget subsidies for people starting up their own businesses, the joint organisation of job fairs and job exchanges, the exchange of job offers which are difficult to fill, and the joint implementation of special programmes addressed to unemployed people.⁵²⁵

⁵¹⁹ S 23(1) of the SDA.

⁵²⁰ S 23(2) of the SDA.

⁵²¹ S 24 of the SDA. The Director-General could cancel the registration of private employment services providers who fail to comply with prescribed conditions (s 25 of the SDA). The decision of the Director-General to cancel the registration of an employment service may be challenged by way of appeal to the Labour Court (s 26 of the SDA).

⁵²² Article 2(1) of the *Unemployment Convention*. It terms of the article 1(1) of the *Employment Service Convention* 88 of 1948, it is the duty of the government to maintain or ensure the maintenance of a free public employment service.

⁵²³ Article 2(2) of the *Unemployment Convention*.

⁵²⁴ Article 13(1) of the *Private Employment Agencies Convention* 181 of 1997.

⁵²⁵ ILO *Promoting Employment: Policies, Skills, Enterprises* (ILO (2004)) paragraph 300.

Very little (or nothing) has been done in South Africa as far as the coordination of the operations of and the co-operation between the public employment service and private employment agencies are concerned. The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has unsuccessfully requested the government of South Africa on numerous occasions to supply it with information on the steps taken to co-ordinate the operations of public and private employment services as requested by the *Unemployment Convention*.⁵²⁶ It is disappointing to note that these requests continue to be issued several years after the government's statement in 1995 to the effect that no steps have been taken in South Africa to co-ordinate the operations of public and private employment agencies.⁵²⁷ South Africa in its quest to foster co-operation between the two could encourage both agencies to co-operate and exchange information on matters of mutual interest informally. Alternatively, it could adopt a formal route which could include special agreements between the two or even add a regulation on this subject in the SDA.⁵²⁸

2.3.4.5. Funding

Skills development programmes are financed through skills development levies⁵²⁹ which are collected and transferred to the National Skills Fund in terms of the *Skills Development Levies Act*, money appropriated by Parliament for the National Skills Fund, interest earned on investments, donations, and money provided from any other sources.⁵³⁰ Employers who operate approved training programmes can claim back 80% of their skills development levy. Every public services employer in the national and provincial spheres of government has an

⁵²⁶ See, for example, Committee of Experts on the Application of Conventions and Recommendations (CEACR) *Individual Observations concerning Convention No. 2, Unemployment, 1919 South Africa (ratification: 1924)* Submitted: 2005 and Committee of Experts on the Application of Conventions and Recommendations (CEACR) *Individual Observations concerning Convention No. 2, Unemployment, 1919 South Africa (ratification: 1924)* Submitted: 1999.

⁵²⁷ Committee of Experts on the Application of Conventions and Recommendations (CEACR) *Individual Observations concerning Convention No. 2, Unemployment, 1919 South Africa (ratification: 1924)* Published: 1995.

⁵²⁸ See ILO *Promoting Employment: Policies, Skills, Enterprises* (ILO (2004)) at paragraphs 301-302.

⁵²⁹ A skill development levy comprises of 1% of an organisation's salary and wage bill.

⁵³⁰ See ss 14(1) and 27 of the SDA. The money collected in the National Skills Fund's favour may only be used for the projects identified in the national skills development strategy as national priorities or for such other projects related to the achievement of the purposes of the SDA (s 28 of the SDA).

obligation to budget for at least one per cent of its payroll for the training and education of their employees and has the discretion to contribute funds to a SETA.⁵³¹

2.3.4.6. Adjudication, monitoring and enforcement

The Labour Court has, subject to the jurisdiction of the Labour Appeal Court and except where the SDA provides otherwise, exclusive jurisdiction on all matters arising from the SDA.⁵³² The Labour Court has review powers.⁵³³ Should proceedings involving the SDA be instituted in a court with no jurisdiction such a court may at any stage during the proceedings refer the matter to the Labour Court.⁵³⁴ Persons who obstruct or attempt to influence improperly a person who is performing a function in terms of the SDA, obtain or attempt to obtain any prescribed document by means of fraud, false pretences or by submitting a false or forged prescribed document, furnish false information in any prescribed document knowing that information to be false, or provide employment services for gain without being registered in accordance with the SDA, commit an offence.⁵³⁵ Upon conviction, such persons may be sentenced to a fine or imprisonment for a period not exceeding one year.⁵³⁶

2.3.5. Skills development: Some observations

Skills development cannot be touted as a panacea to the unemployment situation in South Africa as “skills development takes time, and therefore can offer little respite to the reality of unemployment and poverty in the short- to medium-term.”⁵³⁷ Nonetheless, it should be stressed that skills development is a crucial component of the South African (un)employment protection system and, therefore, measures and policies aimed at providing the South African labour force with skills are crucial. As is apparent from the preceding discussion the South Africa skills development programme is far from perfect. Firstly, the skills development programmes and policies, as is the case with many other social policies in South Africa, are

⁵³¹ S 30 of the SDA.

⁵³² S 31(1) of the SDA.

⁵³³ S 31(2) of the SDA.

⁵³⁴ S 31(3) of the SDA.

⁵³⁵ S 33 of the SDA.

⁵³⁶ S 34 of the SDA.

⁵³⁷ Naidoo R and Jarvis D “Skills development not a panacea” – accessed at <http://www.naledi.org.za>.

more focused on the formal sector. They pay little or no attention to the training needs of the informal economy despite rising informal economy activities and high levels of vulnerability normally associated with the informal economy. This insensitivity towards the training and skills development needs of the informal economy has negative results. The lack of or limited access to training and skills development effectively means that skills development in this sector will remain stagnant and unresponsive to the changing needs of the labour market. Consequently this has a negative impact on the (re)integration of informal economy participants into the formal economy. The absorption capacity of the South African formal economy is limited.⁵³⁸ In view of that, skills upgrading in the informal economy should be made an integral component of the overall skills strategy in South Africa.⁵³⁹ Furthermore, the reimbursement of portions of the skills development levies to employers has shown to be an insufficient incentive.⁵⁴⁰ This is problematic in the sense that it results in the under-utilisation of the Skills Development Funds. In addition, there is poor linkage between passive labour market measures contained in the UIA and the active labour market measures provided for by the SAD. Another source of concern is South Africa's poor efforts to co-ordinate the private and public employment agencies as required by the *Unemployment Convention*. This requires agent attention, particularly in view of the fact that there has been several direct requests from the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) for the government of South Africa to furnish it with information on the steps taken to co-ordinate the operation of public and private employment services as requested by the *Unemployment Convention*. Lastly, the SDA provides a framework on skills development with no enforceable rights or obligations.

2.4. Informal social security

Apart from the typical unemployment protection measures such as unemployment insurance and unemployment assistance schemes there are other coping strategies or mechanisms, namely informal social security, which do play a role in providing a safety net to victims of

⁵³⁸ McGrath S "Skills development for enterprise development: A major challenge for 'joined-up' policy" in McGrath S *et al* (eds) *Shifting Understandings of Skills in South Africa: Overcoming the Historical Imprint of a Low Skills Regime* (HRSC Press (2004)) 194 at 194.

⁵³⁹ *Ibid.*

⁵⁴⁰ Naidoo R and Jarvis D "Skills development not a panacea" – accessed at <http://www.naledi.org.za>.

unemployment. These safety nets are crucial in an unemployment protection system, particularly in developing countries – even though at times their importance is not often appreciated. Informal social security⁵⁴¹ measures include those informal self-organised measures by individuals, families and community members to cushion the effects and consequences of unemployment and other social risks.

As pointed out above, the South African unemployment protection safety net, as is the case with other social security measures, is characterised by holes. Those who slip through these holes are left at the mercy of destitution, vulnerability, poverty and social exclusion. Many vulnerable unemployed or informally employed persons have come together either as families or/and communities, and devised their own coping strategies. While these strategies should not be romanticised as the best option for the vulnerable majority, the truth is that they have proved by far that they do play an important unofficial role in the South African unemployment protection system. Informal social security comprises of those self-organised informal safety-nets⁵⁴² which are based on membership of a particular social group or community, including, but not limited to, family, kinship, age group, neighbourhood, profession, nationality, ethnic group, and so forth. Informal social security, as pointed out by

⁵⁴¹ It should be noted that the terms ‘informal social security’ and ‘informal safety nets’ have been used interchangeably in this study.

⁵⁴² See, for further reading about the concept of informal social safety nets, Kaseke E “Informal social security in eastern and southern Africa” in *Towards the Development of Social Protection in the SADC Region* (Proceedings and Outcomes of a Conference Held at the Helderfontein Conference Centre, Johannesburg, South Africa, 17-19 October 2001 (2002)) 245, Van Ginneken W (ed) *Social Security for the Excluded Majority: Case Studies of Developing Countries* (ILO (1999)), Devereux S ‘*Making Less Last Longer*’: *Informal Safety Nets in Malawi* (Institute of Development Studies Discussion Paper 373 (1999)), Dercon S “Safety nets, savings and informal social security systems in crisis-prone economies” Paper presented at the Annual Bank Conference on Development Economics in Europe, Paris, 21-23 June 1999, Subarro K *Namibia’s Social Safety Net: Issues and Options for Reform* (Policy Research Working Paper (1996)), McDonald C *et al* *Income Distribution, Informal Safety Nets, and Social Expenditures in Uganda* (International Monetary Fund Working Paper (1996)), Clu K and Gupta S “Social safety nets in economic reform” in Clu K and Gupta S (eds) *Social Safety Nets: Issues and Recent Experiences* (International Monetary Fund (1998)) 7 at 27, Ahmad E “Protecting the vulnerable: Social security and public policy” in Lipton M and Van der Gaag J (eds) *Including the Poor* (World Bank (1993)) 359 at 364-366, Platteau J-P “Traditional systems of social security and hunger insurance: Past achievements and modern challenges” in Ahmad E *et al* (eds) *Social Security in Developing Countries* (Claredon (1991)) 112, Von Braun J “Social security in sub-Saharan Africa: Reflections on policy challenges” in Ahmad E *et al* (eds) *Social Security in Developing Countries* (Claredon (1991)) 395 at 406- 410, Ahmad E “Social security and the poor: Choices for developing countries” (1991) 6 *World Bank Research Observer* 105 at 111-112 and Von Benda-Beckmann F *et al* (eds) *Between Kinship and the State: Social Security and Law in Developing Countries* (Foris (1988)).

Gsänger,⁵⁴³ essentially rests on anyone or any combination of four security pillars: individual provisions based on individual economic activities (self-employed as peasants and subsistence farmers or as casual wage labourers in agriculture, or in informal off-farm jobs); membership of traditional solidarity networks (family, kinship, neighbourhood, etc); membership of co-operative or social welfare associations (self-help groups, rotating savings and credit clubs, cultural associations, etc); and access to (non-governmental) public benefit systems (targeted transfers, donations, social services provided by voluntary organisations, churches, trade unions, etc).

2.4.1. Types of informal safety nets distinguished

Two forms of informal safety nets for the unemployed are identifiable, namely kinship and community-based informal safety nets (largely arranged by or through families and people of the same neighbourhood(s)) and member organisation-based informal safety nets (largely organised by informal economy workers).

2.4.1.1. Kinship and community-based informal safety nets

Kinship and community-based informal safety nets are based on family ties or membership of a particular community. This type of informal safety nets is built around certain social values, such as African values, which require a certain way of life. This is a way of life which is based on solidarity, collective responsibility, compassion, equality, unity, self-determination, human respect and human dignity. Families and their communities fathom life as a unit. That is a unit in which families and communities do not tolerate seeing their members being destitute. Instead of keeping their distance, other members pool resources (no matter how little they are) and share the risk(s). These risks are, in some instances, induced by unemployment. Through intergenerational transfers families provide assistance to their

⁵⁴³ Gsänger H “Linking informal and formal social security systems” *Deutsche Stiftung für Internationale Entwicklung* – accessed at <http://www.dse.de/ef/social/gsaenger.htm>. While it should be noted that Gsänger’s observations are based on informal social security systems as found in Kenya, it is nonetheless clear that these four pillars are observable in informal social security systems as found in southern Africa. See Freiberg-Strauss J *Social Security for the Poor – Options and Experiences* (Deutsche Gesellschaft für Technische Zusammenarbeit (1999)) 3.

needy unemployed members. Unemployed members of a family or community fall back on other members who often provide assistance which may be in cash or kind. As Burgess and Stern put it:

“...the family is for many the first place to turn...To a large extent the family or community serves many of the roles carried out by formal institutions in developed countries...Transfers between related or proximate individuals, for example, have been shown to serve the purposes of risk mitigation, insurance against income shortfalls, support for the elderly in retirement, help during illness, unemployment insurance, educational loans, and financing of rural-urban migration. These transfers represent an important component of household income and expenditure both in traditional village and rural households as well as in urban households.”⁵⁴⁴

2.4.1.2. Member organisation-based informal safety nets

Member organisation-based informal safety nets are “non-kin based mutual aid arrangements which respond to specific social needs of their members.”⁵⁴⁵ Typical examples of member-based safety nets are burial societies, rotating savings and credit clubs, and informal economy-based social security arrangements.⁵⁴⁶ There are several examples of member-based organisations both in South Africa (such as the South Africa’s Self-Employed Women’s Union (SEWU) which is modelled along the lines of the Self-Employed Women’s Association of India) and abroad (such as the Self-Employed Women’s Association (India); the Action for Community Organisation, Rehabilitation and Development (India);

⁵⁴⁴ Burgess R and Stern N “Social security in developing countries: What, why, who, and how” in Ahmad E *et al* (eds) *Social Security in Developing Countries* (Clarendon (1991)) 41 at 59.

⁵⁴⁵ Kaseke E “Informal social security in eastern and southern Africa” in *Towards the Development of Social Protection in the SADC Region* (Proceedings and Outcomes of a Conference Held at the Helderfontein Conference Centre, Johannesburg, South Africa, 17-19 October 2001 (2002)) 245.

⁵⁴⁶ Rotating savings and credit clubs are common throughout Africa. This is evident from the various names used to identify rotating savings and credit clubs that vary from one African country to another. See Tripp AM *Non-formal Institutions, Informal Economies, and the Politics of Inclusion* (WIDER Discussion Paper no. 2001/108 (2001)) fn 6 and Madembo RC “The role of savings and credit schemes in meeting the social security needs of communal farmers” in Kaseke E (ed) *Social Security Systems in Rural Zimbabwe* (Friedrich Ebert Stiftung (1997)). The concept of rotating savings and credit clubs has been explained by Mutangadura (Mutangadura G *et al* *A Review of Household and Community Responses to the HIV/AIDS Epidemic in the Rural Areas of Sub-Saharan Africa* (UNAIDS (1999)) 31) as follows: “A ROSCA [rotating savings and credit club] is a group of people who agree to make contributions to a fund which is given in whole or in part to each contributor in turn; each member makes the same contribution. After everyone has had their turn in receiving the contributions, the group may disband or start another cycle. Among rural people, the contributions are either in cash or in kind (e.g. food, agricultural inputs, kitchen utensils, etc).”

Association for Sarva Seva Farms (India); the Society for Promotion of Area Resource Centres (India); and the Mutual Society for Health Care in the Informal Sector (Tanzania)). Mutuality-based arrangements are crucial in that:

“...they enable the poor to accumulate assets. This is pertinent given the high levels of poverty and underdevelopment. These self-organised mutual support systems provide the poor with an opportunity to reduce their vulnerability to poverty. There are more women than men who are involved in self-organised mutual support systems primarily because these give women an opportunity to accumulate assets in their own right.”⁵⁴⁷

2.4.2. Disadvantages of informal safety nets

While the importance of informal safety nets, in aiding vulnerable members of the various societies they serve, should be acknowledged, they should not be seen as *the* ultimate safety nets for excluded and marginalised because there are always “limits to how much ‘one hungry man can help another hungry man.’”⁵⁴⁸ The main point of criticism attached to informal safety nets is that they provide insufficient protection; are unreliable, inconsistent and unstable; and are susceptible to external shocks.⁵⁴⁹ This is, to some degree, correct.⁵⁵⁰ In

⁵⁴⁷ Kaseke E “Informal social security in eastern and southern Africa” in *Towards the Development of Social Protection in the SADC Region* (Proceedings and Outcomes of a Conference Held at the Helderfontein Conference Centre, Johannesburg, South Africa, 17-19 October 2001 (2002)) 245.

⁵⁴⁸ World Bank “The poor rely on informal networks and local institutions to survive, including the local holy man and the local nurse” – accessed at <http://www.worldbank.org>.

⁵⁴⁹ See, for example, Morduch J and Sharma M *Strengthening Public Safety Nets from the Bottom Up* (World Bank Institute (2002)) 7, Ahmad E “Protecting the vulnerable: Social security and public policy” in Lipton M and Van der Gaag J (eds) *Including the Poor* (World Bank (1993)) 359 at 366 and Ahmad E “Social security and the poor: Choices for developing countries” (1991) 6 *World Bank Observer* 105 at 110.

⁵⁵⁰ This statement should be approached with the understanding that while families and communities are often forced to rely on informal safety nets by circumstance beyond their control, in other parts of the world (such South Africa, southern Africa and the rest of Africa) this is not the only reason why people participate in informal safety nets. As Olivier and Mpedi (Olivier MP and Mpedi LG “Extending social security to families in the African context: The complementary role of formal and informal social security” Paper presented at the 4th International Research Conference on Social Security, Antwerp, 5-7 May 2003, – accessed at <http://www.issa.int/pdf/anvers03/topic2/olivier.pdf>) puts it: “Yes, it is true that individuals, families and communities have to rely on informal social security by circumstance beyond their control such as exclusion and marginalisation by the formal system. It is also true that informal social security cannot provide for all the social security needs of the society. However, in the same breadth, it should be acknowledge and appreciated that informal social security is to many African individuals, communities and families a way of life. Informal social security brings out one’s humaneness, it gives one the opportunity to belong, participate and share. This is typically African. Africans, by their very African nature, approach life as a unit. Africans and their values are inseparable. This is evident from the strong sense of pride of many Africans, more especially who live in rural settings, who will offer resistance to anything that may threaten their sense of identity and togetherness.”

practice, informal safety nets are vulnerable to a variety of challenges, such as HIV/Aids,⁵⁵¹ urbanisation and migration.⁵⁵² The extended family is, within the kinship-based arrangements' context, instrumental in providing support to its vulnerable members which encompass the unemployed. Nonetheless, the increasing scale of need – largely due to the abovementioned challenges – is increasingly eroding the ability of this coping mechanism to provide support to the vulnerable members of the family.⁵⁵³ This steady weakening of kinship-based coping strategies has, to some extent, led to the development of mutuality-based arrangements. In the same way as kinship-based arrangements, member organisation-based informal safety nets' efficiency to shield their vulnerable members is imperfect. As Kaseke puts it:

“[Many of these schemes] are riddled with corruption which results in resources being diverted away from the schemes for the benefit of a few. The schemes are also undermined by the lack of expertise and poor leadership. This is manifested through poor financial management and poor records keeping. The HIV/Aids pandemic has also seriously undermined non formal social security schemes. These schemes are loosing their members frequently resulting in a reduced flow of resources to the schemes. Ultimately, this impacts negatively on the benefits received by membership. Burial societies are particularly more vulnerable as they are paying benefits more frequently than previously envisaged. This therefore results in a mismatch between inflow and outflow of resources a situation which...forces burial societies to reduce their benefits.”⁵⁵⁴

⁵⁵¹ See, for example, Mutangura GB “Women and Aids in southern Africa: The case of Zimbabwe and its policy implications” (2001) 1 *Jenda: A Journal of Culture and African Women Studies* 1 at 4, ILO *HIV/AIDS: A Threat to Decent Work, Productivity and Development* (ILO (2000)) 9 and UNICEF *Children Orphaned by AIDS: Front-line Responses from Eastern and Southern Africa* (UNICEF (1999)) 3.

⁵⁵² See, for example, Nott J and Yates S “A challenge to invisibility: Intergenerational experiences of ageing in the urban context” Paper presented at the Urban Policy Group DSA Conference University of Bath, September 1999, Malhortra R and Kabeer N *Demographic Transition, Inter-generational Contracts and Old Age Security: An Emerging Challenge for Social Policy in Developing Countries* (Institute of development Studies (2002)), Apt NA “Rapid urbanisation and living arrangements of older persons” – accessed at http://www.un.org/esa/population/publication/bulletin42_43/apt.pdf, Apt NA “Ageing in Africa” Paper prepared for World Congress on Medicine and Health, Hanover, 21 July-31 August 2000 – accessed at <http://www.mh-hannover.de> and “Safety nets and poverty alleviation” – <http://www.malawi.gov.mw/finance/nec/safpal.htm>.

⁵⁵³ Kaseke E “Informal social security in eastern and southern Africa” in *Towards the Development of Social Protection in the SADC Region* (Proceedings and Outcomes of a Conference Held at the Helderfontein Conference Centre, Johannesburg, South Africa, 17-19 October 2001 (2002)) 245.

⁵⁵⁴ *Ibid* 248.

2.4.3. Strengthening informal safety nets

In view of the limits and the subsidiary role of informal safety nets in respect of the formal schemes (such as unemployment protection schemes) it is submitted that ways and means need to be investigated and introduced to preserve and strengthen these informal coping strategies. There is a dire need for governmental intervention to reinforce these schemes. It should be recalled that the state has a duty, which is subject to the availability of resources,⁵⁵⁵ to take reasonable legislative and other measures to achieve the progressive realisation of the right of access to social security.⁵⁵⁶ In light of *Government of the Republic of South Africa v Grootboom*⁵⁵⁷ (hereinafter *Grootboom*) it could be concluded that: “The responsibility in areas of social security implementation and service delivery is shared not only by state institutions at the various levels, but also by other agents within society, including individuals themselves. Providers of informal social security are, therefore, also meant to be included. They must be enabled by legislative and other measures to provide the necessary facilities and services (within the *Grootboom* case, this refers to housing). National government bears the overall responsibility for ensuring that the state complies with its constitutional obligations.”⁵⁵⁸

Replacing and/or over-regulating these schemes is, for a variety of reasons, not advisable. Such a move could destroy them completely:

“The main problem with the extension of the formal social system is the fact that it was – for most part – not designed to address the needs of the informal sector. Since it is based on the employee relationship, it normally requires the payment of amounts much higher than what workers in the informal sector can afford. Another reason why mere extension of traditional (formal) social security mechanisms may not be feasible is because the African people, especially in rural communities, have a

⁵⁵⁵ S 27(2) of the Constitution.

⁵⁵⁶ *Ibid.* It addition, the general social security provisioning philosophy in South Africa has always been (and continues to be) that: “While the state accepts a duty to take measures to prevent social suffering on the part of its citizens and for making a selective contribution to relieving and combating social distress, this is viewed as a supplementary responsibility. The major onus lies on the person himself, his family and the community” (McKendrick B and Dudas E “South Africa” in Dixon J (ed) *Social Welfare in Africa* (Croom Helm (1987)) 184 at 185 and 193).

⁵⁵⁷ 2000 11 BCLR 1169 (CC) (at paragraphs 36 and 66).

⁵⁵⁸ Dekker AH and Olivier MP “Informal social security” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 559 at 578-579.

strong sense of pride in their own tradition and functioning of their communities, and thus often resist changes imposed on them from the outside and which do not evolve from the communities themselves.”⁵⁵⁹

A variety of measures that may be employed have been raised by a number of eminent scholars in this field of social protection. Kaseke,⁵⁶⁰ for example, in his plea for the strengthening of informal safety nets, points out that the starting point for governments before they commence with the drive to formalise these coping strategies is to recognise and acknowledge their importance in the provision of social security:

“The starting point in efforts to strengthen non-formal social security systems and schemes is recognition by governments that non-formal social security schemes are providing social protection to the majority of the people. Governments also need to accept that formal social security schemes as currently conceptualised and designed do not capture the poor who constitute the majority of the population. The following suggestions are pertinent:

- Providing training to members of mutual support schemes in order to improve the management of these schemes.
- Provision of financial assistance by government and non-governmental organisations in order to improve their financial base and thereby enhance their capacity to provide better social protection.
- Widening the scope of non-formal social security systems in order to enhance social protection.
- Introducing linkages with formal social security systems so as to improve social protection. This would make it possible for non-formal social security schemes to incorporate the social insurance principle of risk-sharing.

In conclusion, it is important to note that social security will remain a dream for the poor unless efforts are taken to expand and strengthen non-formal social security schemes. Confining government efforts to formal social security will only serve to exacerbate existing inequalities between the rich and the poor.”⁵⁶¹

Apart from Kaseke’s instructive exposition, the Committee has also called for the reinforcement of informal safety nets by government:

⁵⁵⁹ Olivier MP and Mpedi LG “Extending social security to families in the African context: The complementary role of formal and informal social security” Paper presented at the 4th International Research Conference on Social Security, Antwerp, 5-7 May 2003, – accessed at <http://www.issa.int/pdf/anvers03/topic2/2olivier.pdf>

⁵⁶⁰ Kaseke E “Informal social security in eastern and southern Africa” in *Towards the Development of Social Protection in the SADC Region* (Proceedings and Outcomes of a Conference Held at the Helderfontein Conference Centre, Johannesburg, South Africa, 17-19 October 2001 (2002)) 245 at 248-249.

⁵⁶¹ *Ibid.*

“It is important not to impose a social security system that will be detrimental to traditional support mechanisms. Transformation of the present social security framework should, therefore, aim at supporting and strengthening existing informal social security with the view to enhancing solidarity. In the first instance this requires considering ways to integrate currently excluded groups into formal schemes. This includes embarking on pilot schemes aimed at supporting informal social security mechanisms; removing unnecessary legal restrictions in relation to access to schemes; devising tailor-made schemes to cater for these excluded and marginalized categories and groups; introducing compulsory membership of private or public social schemes; and campaigns to promote private insurance and savings. Further, there is a need to consider broader interventions and programmes that bolster the overall ability of communities and informal systems to cope with and manage increased levels of risk and hardship.”⁵⁶²

2.4.4. Informal safety nets: Some observations

Informal safety nets, as indicated above, form part of the strategies invoked by a majority of those who are excluded and marginalised from formal social security schemes (e.g. the unemployment insurance scheme). These coping strategies extend social security coverage (directly and/or indirectly) to certain excluded groups and categories of persons – particularly the unemployed. A majority of individuals, almost throughout the world, survive social risks (which include unemployment and its effects) on informal safety nets.⁵⁶³ There is, as suggested above, a need for the strengthening of these coping strategies.⁵⁶⁴ This alternative

⁵⁶² Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa* (March 2002) 74-75.

⁵⁶³ Van Ginneken W “Overcoming social exclusion” in Van Ginneken W (ed) *Social Security for the Excluded Majority: Case Studies of Developing Countries* (ILO (1999)) 1 at 20. Also see, Nanavaty R “From local to global and informal to formal: Entering mainstream markets” Paper presented at the EGDI and UNU-WIDER Conference Unlocking Human Potential: Linking the Formal and Informal Sectors, Helsinki, Finland, 17-18 September 2004, Dekker AH and Olivier MP “Informal social security” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 559 at 573-574, Lund F “A framework for the comparative analysis of social protection for workers in the informal economy” (2001) – accessed at <http://www.wiego.org/papers/spframework.doc>, Lund F and Srinivas S “Learning from experience: A gendered approach to social protection for women in the informal sector economy” Overview Paper for ILO-WIEGO Seminar on Social Protection for Women Workers in the Informal Economy (1999) – accessed at <http://www.wiego.org/papers/lund.pdf>, and Krishnaswami L “From drudgery to dignity: The SEWA experience” (1985) 10 *Labour and Society* 323.

⁵⁶⁴ See paragraph 2.4.2.3. above. Also see Olivier MP *et al* “Formulating an integrated social security response: Perspectives on developing links between informal and formal social security in the SADC region” Paper presented at the EGDI and UNU-WIDER Conference Unlocking Human Potential: Linking the Informal and

should not, however, be seen as suggesting that the government should abdicate its duty to provide access or create an appropriate social security framework for those individuals (particularly the unemployed) who are excluded from formal social security coverage. It does, however, highlight the need for state involvement in assisting the excluded and the marginalised masses such the unemployed.

3. EMPLOYMENT PROTECTION

Employment protection is crucial for workers everywhere,⁵⁶⁵ but particularly so in South Africa where, as discussed above, the unemployment protection system is inadequate and high unemployment is rife. The lack of a comprehensive unemployment protection system and the relentless shortage of gainful employment in South Africa could imply a lifetime of unemployment for a discharged employee. Prospects of receiving satisfactory unemployment

Formal Sectors, Helsinki, Finland, 17-18 September 2004, Chen MA *et al* *Supporting Workers in the Informal Economy: A Policy Framework* (ILO (2002)) 40, Kaseke E “Informal social security in eastern and southern Africa” in *Towards the Development of Social Protection in the SADC Region: Proceedings and Outcomes of a Conference held at the Helderfontein Conference Centre, Johannesburg, South Africa, 17-19 October 2001* (2002) 245, Apt NA “Ageing in Africa” Paper prepared for World Congress on Medicine and Health, Hanover, 21 July-31 August 2000 – accessed at <http://www.mh-hannover.de>, Bailey C “Extending the range of social protection” in ILO *Reflections on Reform Strategies for Social Protection in English-Speaking African Countries* (ILO (2000)) 33 at 82-85, Von Benda-Beckmann F *et al* “Indigenous support and social security: Lessons from Kenya” in Midgley J and Sherraden M (eds) *Alternatives to Social Security: An International Inquiry* (Auburn House (1997)) 105, Midgley J “Social security in developing countries: Integrating state and traditional systems” (1994) 22/23 *Focaal-European Journal of Anthropology* 219, Ahmad E “Social security and the poor: Choices for developing countries” (1991) 6 *World Development Research Observer* 105 at 110, Gsänger H “Linking informal and formal social security systems” *Deutsche Stiftung für Internationale Entwicklung* – accessed at <http://www.dse.de/ef/social/gsaenger.htm>, Apt NA “Ageing in Africa: Revisiting traditional safety nets” – accessed at http://www.geocities.com/csps_Ghana/ageing/safety.html, Gsänger H “Linking informal and formal social security systems” *Deutsche Stiftung für Internationale Entwicklung* – accessed at <http://www.dse.de/ef/social/gsaenger.htm>, Von Benda-Beckmann F and Kirsch R “Informal security systems in Southern Africa and approaches to strengthen them through public policy measures” – accessed at <http://www.gtz.de> and Mouton P and Gruat J-V “The extension of social security to self-employed persons in Africa” (1988) 1 *International Social Security Review* 40 at 52-53.

⁵⁶⁵ This is largely due to the economic and social hardships which may arise from the loss of employment (which could impact negatively on a worker and his or her family). According to Dasgupta (Dasgupta S *Employment Security: Conceptual and Statistical Issues* (ILO (2001)) 6-7): “Employment security is the main means to income security. It enhances worker welfare. International human rights instruments broadly acknowledge the right to protection against employment loss. According to Article 23 of the Universal Declaration of Human Rights, 1948, it is the right of all persons ‘to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment’. Employment security is especially important in developing economies that do not have a system of unemployment benefit. Loss of employment in such situations leads to loss of income, and loss of livelihood. This may mean hunger and misery not only for the person losing his employment but his family and dependents, as fall back options beyond the community and family networks are few.” Also see Burgess J and Mitchell WF *Unemployment, Human Rights and Full employment in Australia* (Centre of Full Employment and Equity (1998)) 10.

protection and/or of finding alternative employment are slim.⁵⁶⁶ One of the basic tenets underlying employment security is that an employee should not be deprived of his or her employment without a valid ground. Although an employer might have a valid ground a fair procedure should be followed in effecting a dismissal. South Africa endeavoured, even prior to the post apartheid unemployment protection system, to safeguard the preservation of the workers' employment against arbitrary employer conduct. The unfair labour practice concept and the retrenchment principles which were mainly developed by the then industrial and labour appeal courts are the case in point.⁵⁶⁷ The development of these concepts was not in vain. Many have been incorporated in the post apartheid employment protection statutory framework. For instance, the retrenchment principles developed by the industrial court can now be found in the *Labour Relations Act* (LRA)⁵⁶⁸ and the *Basic Conditions of Employment Act* (BCEA).⁵⁶⁹ In the following paragraphs the substantive and procedural requirements for fair dismissal as found in the South African unemployment protection system are discussed. That is the administrative restrictions and procedures to curb dismissals as well as severance pay.

3.1. Substantive and procedural requirements for fair dismissal

Substantive and procedural requirements for fair dismissal have been put in place to foster employment protection. These requirements comprise of recognised grounds upon which an employee can be legally dismissed and procedures to be followed prior to a dismissal. The South African employment protection statutory framework – comprising largely of the Constitution, the LRA and the BCEA – embraces the right not to be unfairly dismissed and subjected to unfair labour practices. The right to fair labour practices is entrenched in the Constitution as a fundamental right which is (or should be) enjoyed by every person in South

⁵⁶⁶ As remarked earlier, the benefits provided under the South African unemployment insurance scheme are inadequate. Furthermore, there are no unemployment assistance benefits for those unemployment insurance beneficiaries who exhaust their unemployment insurance benefits. As regards finding alternative employment, it should be recalled that the South African unemployment protection system is mainly characterised by limited measures to reintegrate those individuals who lost their jobs into the labour market.

⁵⁶⁷ See, for example, Grogan J *Dismissal* (Juta (2002)) 4-6.

⁵⁶⁸ S 189 of the LRA.

⁵⁶⁹ S 41 of the BCEA.

Africa.⁵⁷⁰ In *National Education Health & Allied Workers Union v University of Cape Town*,⁵⁷¹ the Constitutional Court held that the right not to be unfairly dismissed contained in the LRA is essential to the constitutional right to fair labour practices. It further pointed out that, this right seeks to ensure the continuation of the relationship between the worker and the employer on terms that are fair to both. Alongside the right to fair labour practices there are other fundamental rights (e.g. right to equality; right to human dignity; and the right to freedom of trade, occupation and profession) and constitutional values (e.g. human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; the rule of law⁵⁷²) which are equally important for employment protection in South Africa.

Several laws, which include the LRA, the BCEA and the EEA, have been enacted to give effect to the right to fair labour practices.⁵⁷³ For instance, the LRA provides every employee⁵⁷⁴ with the right not to be unfairly dismissed and subjected to unfair labour practice.⁵⁷⁵ However, employees in South Africa have no right to indefinite and permanent employment with a particular employer.⁵⁷⁶ The scope of protection regarding the right to fair labour practices afforded by labour laws, particularly the LRA, seems narrower than that contained in the Constitution.⁵⁷⁷ For instance, the right to fair labour practices entrenched in the Bill of Rights applies to everyone. The implication of this is that it protects both

⁵⁷⁰ S 23(1) of the Constitution. See *SA National Defence Union v Minister of Defence* 1999 ILJ 2265 (CC) and Cooper C "Right to fair labor practices" (2005) 26 *Comparative Labor & Policy Journal* 199 at 202-206.

⁵⁷¹ (2003) 24 ILJ 95 (CC).

⁵⁷² Ss 1 and 7(1) of the Constitution.

⁵⁷³ See the preamble and s 1(a) of the LRA, the preamble of the EEA, and the preamble and s 2(a) of the BCEA.

⁵⁷⁴ The term 'employee' includes, for the purpose of the prohibition against unfair discrimination, a job seeker (s 9 of the EEA, s 79(1) of the BCEA and (the now repealed item 2(2)(a) of Schedule 7 of the LRA).

⁵⁷⁵ S 185 of the LRA. The term 'unfair labour practice', in accordance with s 186(2) of the LRA, means: any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee; unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee; a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and an occupational detriment, other than dismissal, in contravention of the *Protected Disclosures Act* (26 of 2000) on account of the employee having made a protected disclosure. See s 1(ix) of the *Protected Disclosures Act* for the definition of a 'protected disclosure'. The foregoing definition, in comparison with that provided by the now repealed item 2(1) of Schedule 7 of the LRA, does not include the prohibition against unfair discrimination. Unfair discrimination is now regulated by, among others, the EEA.

⁵⁷⁶ See, for example, *Hendry v Adcock Ingram* 1998 ILJ 85 (LC).

⁵⁷⁷ See, for instance, *Mans v Mondi Kraft Ltd* 2000 ILJ 213 (LC).

employers and employees.⁵⁷⁸ This is not the case with the LRA's unfair labour practice concept which is not applicable to unfair labour practices emanating from the employees⁵⁷⁹ or the trade union. Even so, an employer may invoke section 23(1) of the Constitution to challenge an unfair labour practice committed by an employee or a trade union.⁵⁸⁰ Labour laws do, as a rule, exclude soldiers and spies from their scope of coverage.⁵⁸¹ On the other hand, these groups might still be covered by the constitutional protection.⁵⁸² Furthermore, employment protection is mainly restricted to those individuals who fall under the 'employee' definition as contained in labour laws (such as the LRA,⁵⁸³ the BCEA and the EEA). Accordingly, many non-standard workers (or atypical workers) have unsatisfactory employment protection. The employment protection contained in most labour laws is biased towards the formal sector. Large pockets of individuals who eke a living in the informal economy and who do not qualify to be employees as statutorily defined are for the most part left without employment protection.⁵⁸⁴

The employment protection cracks discernable in the South African system, to some extent, mirror the gaps in the unemployment protection system. Regardless of that, efforts have been made – particularly in recent times – to extend labour law protection to non-standard workers.⁵⁸⁵ For example, the BCEA's scope of application is much broader than that of its predecessors. The BCEA applies to employees who work at least 24 hours in a month for an employer. The effect of this is that a large variety of non-standard workers (such as casual, part-time, temporary and seasonal workers) stand to benefit from the employment protection measures provided by the BCEA. Furthermore, it makes provision for the possibility of extending various labour law protection measures (e.g. minimum conditions of employment)

⁵⁷⁸ *National Education Health & Allied Workers Union v University of Cape Town* (2003) 24 ILJ 95 (CC).

⁵⁷⁹ See *Maseko v Entitlement Experts* [1997] BLLR 317 (CCMA).

⁵⁸⁰ See *ibid.* Also see *NEWU v CCMA* 2003 ILJ 2335 (LC) at 2340J-2341A.

⁵⁸¹ See s 2 of the LRA, s 3(1) of the BCEA and s 4(3) of the EEA.

⁵⁸² See *SA National Defence Union v Minister of Defence* 1999 ILJ 2265 (CC).

⁵⁸³ The LRA expressly excludes independent contractors from its definition of 'employee' (s 213 of the LRA).

⁵⁸⁴ The situation is aggravated by the fact that there is limited trade union involvement in the informal sector.

⁵⁸⁵ These efforts usually result in the extension of unemployment protection. For example, the recent sectoral determination for the taxi sector (*Sectoral Determination 11: Taxi Sector* (2005) – accessed at <http://www.labour.gov.za>) brought the taxi sector within the ambit of the unemployment insurance scheme (see Mpedi LG "Extending social security and labour law protection to the South African informal sector: An enquiry into recent developments in the taxi sector" (2006) 1 *Recht in Afrika* 43). The conclusion to be drawn is that the extension of labour law protection coverage to non-standard workers affects both employment and unemployment protection measures.

to certain groups of atypical workers by means of a sectoral determination.⁵⁸⁶ The disadvantage of the sectoral determination approach is that it extends labour law protection to non-standard workers in a piecemeal and haphazard fashion. Moreover, the BCEA empowers the Minister of Labour, on the advice of the Employment Conditions Commission and by notice in the Government Gazette, to deem any category of persons specified in the notice to be employees for the whole or part of the BCEA, any other employment law or any sectoral determination.⁵⁸⁷ This approach is to some extent objectionable because “...the implication is that it is left to a political office-bearer to adopt measures if and when he/she deems it appropriate to do so, and not to parliament to regulate coverage extension in the law itself.”⁵⁸⁸ In addition, the preceding pronouncements, it should be recalled that excluded non-standard workers may still enjoy some constitutional protection stemming mainly from section 23 of the Constitution.

In spite of the unusual route taken by South Africa to entrench the right to fair labour practices in its Bill of Rights,⁵⁸⁹ the substantive and procedural requirements for fair dismissal of that country (as embodied in employment laws) are to a large extent similar to those recognised and/or adopted by the International Labour Organisation⁵⁹⁰ and by most countries of the world. The LRA regards a dismissal which is not effected for a fair reason and in accordance with a fair procedure as unfair.⁵⁹¹ It stipulates three internationally recognised grounds on which an employee may be dismissed.⁵⁹² These are the conduct of the employee, the capacity of the employee and the operational requirements of the employer’s

⁵⁸⁶ See ss 55(4)(g) and 55(4)(k) of the BCEA.

⁵⁸⁷ S 83 of the BCEA.

⁵⁸⁸ Olivier MP and Mpedi LG “The extension of social protection to non-formal sector workers – experiences from SADC and the Caribbean” (2005) 19 *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht* (ZIAS) 144 at 157.

⁵⁸⁹ Cooper C “Right to fair labor practices” (2005) 26 *Comparative Labor & Policy Journal* 199 at 200. The rationale behind the inclusion of this (rather broad and vague) right to fair labour practices was, according to Cooper (Cooper C “Right to fair labor practices” (2005) 26 *Comparative Labor & Policy Journal* 199 at 200), “a demand by the public sector employees for access to the unfair [labour] practice law on dismissals developed under the 1956 *Labour Relations Act* (LRA) as a means of protecting their jobs during the transition to a new political dispensation.”

⁵⁹⁰ See the *Termination of Employment Convention* 158 of 1982 and the *Termination of Employment Recommendation* 166 of 1982.

⁵⁹¹ S 188(1) of the LRA.

⁵⁹² See the *Termination of Employment Convention* 158 of 1982 and the *Termination of Employment Recommendation* 166 of 1982. Also see paragraph 2.2.4. in chapter 4.

business.⁵⁹³ Furthermore, the LRA classifies certain dismissals as automatically unfair. These are dismissals which are carried out by an employer contrary to the protection contained in the LRA such as that concerning the right to freedom of association⁵⁹⁴ and contrary to the prohibition against unfair discrimination (such as pregnancy, race, age, sexual orientation and religion).⁵⁹⁵ Nevertheless, a dismissal may be fair if it is based on an inherent requirement of a particular job.⁵⁹⁶ In addition, a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.⁵⁹⁷ The procedural fairness envisaged by the LRA largely involves the observance of the principles of natural justice such as *audi alteram partem*.⁵⁹⁸ The primary goal of procedural fairness, as pointed out by the Labour Court in *Lorentzen v Sanachem (Pty) Limited*,⁵⁹⁹ “is to attempt to ensure the job security of the employee whose position is in jeopardy.” Procedural fairness is not only in the interest of an employee but also of that of an employer. The reality is that “it enables and improves the chances of the employer making a good substantive decision on the merits of the matter.”⁶⁰⁰ This is crucial for the reason that failure to adhere to procedural fairness could prove costly for the employer concerned. An arbitrator or the Labour Court has a discretion, if it finds that a dismissal is procedurally unfair, to order an employer to pay compensation to an employee.⁶⁰¹ Furthermore, as Collins points it:⁶⁰²

“...thorough procedures avoid costs to employers arising from erroneous dismissals. By dismissing only those workers who are either disruptive to production, seriously incompetent, or genuinely no longer needed, and no others, the employer achieves the most efficient use of his labour force. Erroneous dismissals of satisfactory employees may incur unnecessary cost with respect to search, hiring, and training for firm-specific skills, as well as the possible deleterious effects of the replacement workers

⁵⁹³ *Ibid.* ‘Operational requirements’ means “requirements based on the economic, technological, structural or similar needs of an employer” (s 213 of the LRA).

⁵⁹⁴ S 187(1) of the LRA.

⁵⁹⁵ S 187(1)(a)-(f) of the LRA.

⁵⁹⁶ S 187(2)(a) of the LRA.

⁵⁹⁷ S 187(2)(b) of the LRA.

⁵⁹⁸ It should be mentioned, however, that in exceptional circumstances, if an employer cannot reasonably be expected to comply with the pre-dismissal procedures, an employer might dispense with them (item 4 of the *Code of Good Practice: Dismissal* (Schedule 8 of the LRA)).

⁵⁹⁹ (1999) 20 ILJ 1811 (LC).

⁶⁰⁰ *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd* (1997) 10 BLLR 1320 (LC).

⁶⁰¹ S 193(1)(c) of the LRA. The compensation awarded to an employee may not be more than the equivalent of 12 months’ remuneration calculated at the employee’s rate of remuneration on the date of dismissal (s 194(1) of the LRA).

⁶⁰² Collins H *Justice in Dismissal: The Law of Termination of Employment* (Clarendon Press (1992)) at 110.

being less efficient and a general sense of grievance arising among the workforce which would undermine the authority of management.”

Despite their employment protection value, substantive and procedural requirements for fair dismissal stand accused of imposing labour market rigidities (which in turn impact negatively on job creation) and placing intolerable burdens on employers.⁶⁰³ Employers are mostly opposing restrictions complicating the discharge of (unsatisfactory) workers. Furthermore, they blame employment protection restrictions and procedures for favouring employees by, as pointed out earlier, granting the latter with more rights.⁶⁰⁴ The employers’ disapproval of employment protection measures is to some extent unfounded. Employment protection cannot be guaranteed in absolute terms. The point is that “...it is not possible to ignore the interests of the employer or the economic environment within which the worker and the undertaking subsists.”⁶⁰⁵ Consequently, employment protection as contained in labour laws as well as international instruments strives at accommodating employer needs and, most importantly, support employer interests. Firstly, the abovementioned grounds upon which an employer may dismiss (an) employee(s) “cover most circumstances likely to lead to dismissal.”⁶⁰⁶ Secondly, most employer-employee relationships in South Africa commence with a period whereby an employee is placed on probation. Item 8(1)(a) of the *Code of Good Practice: Dismissal* provides an employer with the discretion to place a newly hired employee on probation before the appointment of the employee is confirmed. This is in the employer’s interest because it provides an employer with an opportunity to assess an employee’s suitability for continued employment.⁶⁰⁷ Employees who fail to make the grade

⁶⁰³ For instance: “[The South African business sector] criticised the degree of employment security provided for new entrants to the workplace. Newcomers receive the same rights and benefits as longstanding employees, while probationary employees enjoy almost the same protection against dismissal as those in permanent employment. According to business, the costs of entry and exit from employment create unnecessary rigidities and inhibit job creation” (Cooper C “Globalisation, labour law and unemployment: The South Africa case” in Biagi M (ed) *Job Creation and Labour Law* (Kluwer (2000)) 233 at 238).

⁶⁰⁴ See paragraph 2.3.2. in chapter 2.

⁶⁰⁵ Yemin E “Job security: Influence of ILO standards and recent trends” (1976) 113 *International Labour Review* 17 at 17.

⁶⁰⁶ Dickens L “Comparative systems of unjust dismissals: The British case” (1994) 536 *Annals of the American Academy* 43 at 51.

⁶⁰⁷ Item 8(1)(b) of the *Code of Good Practice: Dismissal*. According to *Thomas v Carlton Centre Pharmacy* (1992) 1 LCD 94 (IC): “...the purpose of probationary employment is to enable the employer to make a fair assessment of the employee’s qualities, such as his competence to do the job, his efficiency, his conduct and his general attitude towards his superiors and his co-workers. If such be the case then it would appear that it would neither be proper nor fair to take on an employee on probation, for whatever period, and then to dismiss at will,

may still be discharged. However, the termination of probationary employment should comply with substantive and procedural fairness.⁶⁰⁸ Accordingly, employers may not use probation for the purpose of depriving employees of the status of permanent employment.⁶⁰⁹ As the *Code of Good Practice: Dismissal* puts it “a practice of dismissing employees who complete their probation periods and replacing them with newly-hired employees, is not consistent with the purpose of probation and constitutes an unfair labour practice.”⁶¹⁰

3.1.1. Notice of termination

The South African employment protection statutory framework safeguards, to a certain degree, employees against abrupt discharge. The BCEA requires employers to give notice of termination of a contract of employment.⁶¹¹ The notice period varies according to the length of service.⁶¹² The notice of termination provision is not absolute. For instance, an employer may pay an employee the remuneration the employee would have received instead of notice.⁶¹³ Furthermore, an employer and an employee have the right to terminate a contract of employment without notice for any cause recognised by law.⁶¹⁴ The notice of termination is calculated at affording an employee who is about to be discharged an opportunity to set in motion the process of searching for alternative employment.⁶¹⁵ The compensation in lieu of notice, on the other hand, could be viewed as an attempt to provide an employee with some income to kick-start the job search immediately after being dismissed without notice. In other

without having first assessed his or her worth as an employee.” Also see Loh ES “Employment probation as sorting mechanism” (1994) 47 *Industrial and Labor Relations Review* 472.

⁶⁰⁸ See item 8(1)-(4) of the *Code of Good Practice: Dismissal*. This, it is opined, confirms the view that probationary employees are entitled to protection. See, for example, *Carlton-Shields v James North (Africa)* (1990) 11 ILJ 82 (IC), *National Union of Metalworkers of South Africa v Tek Corporation Ltd* (1991) 12 ILJ 577 (LAC) at 581H-I and *Schuster v CAPAB Orchestra* (1992) 13 ILJ 1067 (IC). Also see Van Niekerk A “Probation: The rights of parties to probationary contracts of employment – a review” (1992) 2 *Contemporary Labour Law* 41-45.

⁶⁰⁹ Item 8(1)(c) of the *Code of Good Practice: Dismissal*.

⁶¹⁰ *Ibid.*

⁶¹¹ S 37(1) of the BCEA.

⁶¹² *Ibid.* A contract of employment terminable at the instance of a party to the contract may be terminated only on notice of not less than one week, if the employee has been employed for six months or less; two weeks, if the employee has been employed for more than six months but not more than one year; and four weeks, if the employee has been employed for one year or more; or is a farm worker or domestic worker who has been employed for more than six months.

⁶¹³ S 38 of the BCEA.

⁶¹⁴ S 37(6)(b) of the BCEA.

⁶¹⁵ Van Peijpe T *Employment Protection under Strain* (Kluwer (1998)) 46.

jurisdictions, an employee who is serving the notice period is afforded a statutory right to time off with full pay where this is necessary for obtaining assistance from the relevant public authorities (e.g. employment agency) or otherwise for seeking alternative employment.⁶¹⁶ In South Africa, although there is no statutory right to time off, some employers do grant employees time off – particularly in the case of collective dismissals – to go for job interviews.⁶¹⁷ It should be stressed that measures such as notice of termination were developed at the time when employment was abundant. This is, particularly in South Africa, not the case any more.

3.1.2. Additional measures for collective redundancies

The South African statutory employment protection framework acknowledges that collective dismissals are in some instances unavoidable. Nonetheless, there are requirements to be complied with.⁶¹⁸ This is mainly due to the economic and social consequences which often flow from these dismissals.⁶¹⁹ The requirements to be complied with are crucial for employment protection in that they are aimed at ensuring that workforce dismissals are for a *bona fide* economic rationale and are executed in a manner that would avoid unnecessary job losses. Furthermore, efforts are made to minimise the impact of these dismissals on the employees (as well as their dependants) concerned. The administrative restrictions and procedures mentioned above relate largely to consultation, disclosure of information and fair selection criteria. Justice requires that employees be notified about the pending dismissals and be consulted prior to being dismissed, particularly when the reason for the dismissal is unrelated to the employees' conduct or ability to perform their duties.

Prior notification of the intention to retrench is essential for the reason that it affords employees an opportunity to come to terms with the prospect of losing their jobs, to seek

⁶¹⁶ Sweden is one of these countries (see s 14 of the (Swedish) *Employment Protection Act* (SFS 1982: 80)). Also see Yemin E "Comparative survey" in Yemin E (ed) *Workforce Reductions in Undertakings* (ILO (1982)) 1 at 26.

⁶¹⁷ See, for example, *Burger v Alert Engines Parts (Pty) Ltd* [1999] 1 BLLR 18 (LC).

⁶¹⁸ See ss 189 and 189A of the LRA and the *Code of Good Practice on Dismissals based on Operation Requirements*.

⁶¹⁹ Grogan J *Workplace Law* (8th ed) (Juta (2005)) 221.

advice and prepare for consultation⁶²⁰ and, most importantly, to search for employment prior to the dismissal. In addition, it serves (within the context of avoiding, minimising and mitigating the impact of the dismissal) the following purposes: “it affords the employee facing displacement an opportunity to evaluate his [or her] interests and choose a course of action from the available alternatives.”⁶²¹ There are several requirements concerning prior notification embodied in the South African labour law which could be linked with the overall goal of averting or cushioning the impact of collective dismissals. For instance, an employer is obliged by courts to provide ‘sufficient notice’⁶²² to employees.⁶²³

The employer has an obligation to issue a written notice inviting the other consulting party to consult with it.⁶²⁴ The notice must state, among others, the following: the alternatives the employer considered before proposing dismissals, and the reasons for rejecting each of those alternatives; the time when, or the period during which, dismissals are likely to take effect; the severance pay proposed; any assistance the employer proposes to offer to employees likely to be dismissed; and the possibility of the future re-employment of dismissed employees.⁶²⁵ This approach is in accordance with the thinking that “the employees have a right to as much information as possible, and that the effectiveness of the advance notice program is correspondingly increased by rapid dissemination of this information.”⁶²⁶

The consultation process is significant for it provides employers and their employees with an opportunity to consult on measures to prevent or minimise job losses and mitigate the impact of collective dismissals. The reasons behind the need to consult before a final decision on retrenchment is taken are three pronged. The first reason concerns ‘pragmatism’. Pragmatism in this context refers to “the need to avoid retrenchment altogether or at least to minimise

⁶²⁰ *Kotze v Rebel Discount Liquor Group (Pty) Ltd* [2000] 2 BLLR 138 (LAC).

⁶²¹ Webber AR and Taylor AP “Procedures for employee displacement: Advance notice of plant shutdown” (1963) 36 *Journal of Business* 302 at 304.

⁶²² ‘Sufficient notice’, according to Grogan (Grogan J *Workplace Law* (8th ed) (Juta 2005)) 228), means that “the workers or their representatives should be informed as soon as the need to retrench becomes apparent.” See *Similane v Audell Metal Products (Pty) Ltd* (1987) 8 ILJ 438 (IC).

⁶²³ *National Union of Textile Workers v Seagift Surfwear Manufacturers* (1985) 6 ILJ 101 (IC).

⁶²⁴ S 189(3) of the LRA.

⁶²⁵ *Ibid.*

⁶²⁶ Webber AR and Taylor AP “Procedures for employee displacement: Advance notice of plant shutdown” (1963) 36 *Journal of Business* 302 at 311.

dismissals and mitigate their consequences.”⁶²⁷ The second reason relates to ‘principle’. That is “to give employees a chance to be heard and to avoid or minimise industrial conflict.”⁶²⁸ The third reason involves ‘fairness’ to both the employer and the employee(s).⁶²⁹ The right to fair labour practices entrenched in the Constitution mentioned earlier is also applicable in a retrenchment situation. The requirement of consultation has a substantive purpose. As observed by the Labour Appeal Court:

“As far as retrenchment is concerned, fairness to the employer is expressed by the recognition of the employer’s ultimate competence to make a final decision on whether to retrench or not. For the employee fairness is found in the requirement of consultation prior to a final decision on retrenchment. This requirement is essentially a formal or procedural one, but, as is the case in most requirements of this nature, it has a substantive purpose. That purpose is to ensure that the ultimate decision on retrenchment is properly and genuinely justifiable by operational requirements or, put another way, by a commercial or business rationale.”⁶³⁰

In accordance with section 189A of the LRA, trade unions have a right to strike about retrenchments. However, this section only applies to employers employing more than 50 employees and the number of retrenchments in any given 12 month period must be above the prescribed threshold.⁶³¹ Section 189A has been criticised for the reason that: “In contrast to the rest of the LRA, this section [i.e. s 189A] is cumbersome and complex and...unionists and employers find it difficult to understand. The LRA limits the test for substantive fairness for s 189A retrenchment only. In other words, smaller employers may have the ‘last resort’ test applied to their retrenchments.”⁶³² Apart from the substantive purpose, the requirement of consultation prior to a final decision on retrenchment is in line with the principle that justice must not only be done but must also be seen to be done.

⁶²⁷ *Atlantis Diesel Engines (Pty) Ltd v National Union of Metal Workers of South Africa* (1994) 15 ILJ 1247 (A) at 1252I-1253B.

⁶²⁸ Ibid.

⁶²⁹ See Cooper C “Right to fair labor practices” (2005) 26 *Comparative Labor & Policy Journal* 199 at 212-218. Also see Roskam A “An exploratory look into labour market regulation” (Unpublished Paper) 13-18.

⁶³⁰ *South African Clothing and Textile Workers Union v Discreto, a division of Trump and Springbok Holdings* [1998] 12 BLLR 1228 (LAC).

⁶³¹ S 189A(1) of the LRA.

⁶³² Roskam A “An exploratory look into labour market regulation” (Unpublished Paper) 17.

Failure to consult on existing alternatives has, as pointed out in *Kotze v Rebel Discount Liquor Group (Pty) Ltd*,⁶³³ the following effect:

“The failure to consult the Appellant on known alternatives does not affect or detract from the existence of a valid or genuine commercial rationale for retrenchment. It only affects his selection. The selection of an employee for retrenchment does not only impact on the procedural purpose of consultation but also on its substantive purpose. This is so because failure to consult on known alternatives leaves open a possibility that the affected employee might, contrary to the employer’s belief, have accepted the undisclosed alternative to his or her retrenchment. If he or she would have, then it follows that he or she would not have been retrenched and the decision to retrench him or her would therefore be both procedurally and substantively unfair notwithstanding the existence of a genuine business rationale therefor.”

In South African dismissal law, an employer contemplating dismissing employees on the basis of operational requirements has a duty to consult with the employees concerned.⁶³⁴ The LRA directs an employer and the other consulting parties to strive towards avoiding, minimising and mitigating the hardships of the dismissal.⁶³⁵ They should also endeavour to reach consensus on severance pay.⁶³⁶ Disclosure of information goes hand in hand with consultation. In view of the fact that one of the purposes of consultation is to provide employees with a chance to challenge the merits of the proposal to retrench, it would be futile and unfair for employees to consult without the relevant information. To this end, section 189(3) of the LRA imposes an obligation on an employer to issue a written notice inviting the other consulting party to consult with and disclose in writing all relevant

⁶³³ [2000] 2 *BLLR* 138 (LAC).

⁶³⁴ S 189(1) of the LRA. See *Kotze v Rebel Discount Liquor Group (Pty) Ltd* [2000] 2 *BLLR* 138 (LAC) and *Neuwenhuis v Group Five Roads* [2000] 12 *BLLR* 1467 (LC). For special provisions for large-scale retrenchments, see s 189A of the LRA and Grogan J *Dismissal* (Juta (2002)) 229-231.

⁶³⁵ See s 189(2) of the LRA. It is an acknowledged fact that the following steps tend to limit, delay or even avoid collective dismissals: careful planning and, where appropriate, co-operation between the parties regarding arrangements, work-sharing, elimination of overtime, reduction of hours of work, limitation of subcontracting, transfer, retraining of workers and early retirement (Yemin E “Job security: Influence of ILO standards and recent trends” (1976) 113 *International Labour Review* 17 at 30. Also see article 21 of the *Termination of Employment Recommendations* 166 of 1982, Yemin E “Comparative survey” in Yemin E (ed) *Workforce Reductions in Undertakings* (ILO (1982)) 1 at 13–23 and Webber AR and Taylor AP “Procedures for employee displacement: Advance notice of plant shutdown” (1963) 36 *Journal of Business* 302 at 304.

⁶³⁶ See s 189(2) of the LRA.

information.⁶³⁷ Relevant information refers to information which is necessary to enable effective consultation to take place. The employer has a duty to select the employees in accordance with selection criteria that have been agreed to by the consulting parties.⁶³⁸ In the event that no criteria agreed to, it must apply criteria that are fair and objective.⁶³⁹

3.2. Severance pay

Employment protection laws provide an employee who has lost income due to a dismissal with several options through which he or she could claim financial compensation. They include compensation for procedurally unfair dismissals, compensation in lieu of notice and severance pay. Severance pay is an amount of money provided to retrenched employees. This amount is supplementary to and separate from payment in lieu of notice and other entitlements. Severance pay fulfils an important employment protection role in the South African unemployment protection system. The rationale for this is that it is “meant to cushion the blow of unemployment, as a gratuity for services rendered, and as compensation for employees who have lost their jobs through no fault of their own.”⁶⁴⁰ Redundancy payments impose an extra cost for employers.⁶⁴¹ In light of that, it could be argued that they deter employers from resorting to retrenchments without due consideration.⁶⁴² The reasons advanced to justify the payment of severance pay are manifold. Nevertheless, the following rank supreme. Firstly, the termination of employment on account of an employer’s operational requirements is one of the three grounds upon which an employer may discharge an employee. Even so, this ground is different from the other two for it, generally speaking, has nothing to do with an employee’s conduct or capacity to perform work. Consequently, it is argued that employees who lost their livelihood due to no fault of their own deserve

⁶³⁷ It should be kept in mind that an employer is not required to disclose information that is legally privileged, that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court, that is confidential and, if disclosed, may cause substantial harm to an employee or the employer, or that is private personal information relating to an employee, unless that employee consents to the disclosure of that information (s 16(5) of the LRA).

⁶³⁸ S 189(7)(c) of the LRA.

⁶³⁹ S 189(7)(b) of the LRA. See, for further reading on fair criteria, Grogan J *Workplace Law* (8th ed) (Juta 2005)) 235-237 and Grogan J *Dismissal* (Juta (2002) 244-249.

⁶⁴⁰ Grogan J *Workplace Law* (8th ed) (Juta (2005)) 237.

⁶⁴¹ Collins H *Justice in Dismissal: The Law of Termination of Employment* (Clarendon Press (1992)) 164.

⁶⁴² Grogan J *Workplace Law* (8th ed) (Juta 2005)) 237.

employer assistance to tide them over a period of possible unemployment.⁶⁴³ It is also argued that severance pay is a form of appreciation to reward years of faithful service. In addition, it is often argued that long-term employees have a vested interest in their jobs which entitles them to compensation when their employment is terminated due to operational requirements of the employer.⁶⁴⁴ The statutory provisions relating to severance pay are contained in section 41 of the BCEA. In accordance with this section, an employer has a duty to provide an employee with severance pay⁶⁴⁵ equal to at least one week's remuneration for each completed year of continuous service with that employer.⁶⁴⁶ Nevertheless, the Minister of Labour has the discretion – after consultation with the National Economic Development and Labour Council (NEDLAC) and the Public Service Co-ordinating Bargaining Council – to vary the amount of severance pay.⁶⁴⁷ Although an employer has a duty to pay severance pay, it should be noted that an employee who unreasonably refuses to accept the employer's offer of alternative employment with that employer or any other employer is not entitled to severance pay.⁶⁴⁸

⁶⁴³ See, for example, *Young v Lifegro Assurance* (1990) 11 ILJ 1127 (IC), *Commercial Catering and Allied Workers Union of SA v Status Hotel* (1990) 11 ILJ 167 (IC) at 171A, *Hlongwane v Plastix (Pty) Ltd* (1990) 11 ILJ 171 (IC) and *Imperial Cold Storage & Supply Co Ltd v Field* 1993 ILJ 1221 (LAC)). Also see Yemin E "Comparative survey" in Yemin E (ed) *Workforce Reductions in Undertakings* (ILO (1982)) 1 at 26.

⁶⁴⁴ See, for example, *Ntuli v Hazelmores Group t/a Musgrave Nursing Home (Pty) Ltd* (1988) 9 ILJ 709 (IC), *Jacob v Prebuilt Products (Pty) Ltd* (1988) 9 ILJ 1199 (IC) and *Cele v Bester Homes (Pty) Ltd* (1990) 11 ILJ 516 (IC). The Industrial Court in *Cele v Bester Homes (Pty) Ltd* (1990) 11 ILJ 516 (IC) cited with approval the following passage (per Lord Denning) from *Lloyd v Brassey* ((1969) 1 AER 312): "A worker of long standing is now recognised as having accrued rights in his job, his right gains in value over the years. So much so that if the job is shut down he is entitled to compensation for a job – just as a director gets compensation for loss of office. The director gets a golden handshake. The worker gets a redundancy payment. It is not unemployment pay. I repeat 'not'. Even if he gets another job straight away, he is nevertheless entitled to full redundancy payment. It is in a real sense compensation for long service."

⁶⁴⁵ The employer's duty to pay severance pay to retrenched employees was also recognised under the apartheid unemployment protection dispensation. See, the following industrial and (former) labour appeal courts' decisions in which they observed that an employer had a duty to pay redundancy payments, *Ngwenya v Alfred McAlpine* (1986) 7 ILJ 442 (IC), *Ntuli v Hazelmores Group t/a Musgrave Nursing Home (Pty) Ltd* (1988) 9 ILJ 709 (IC), *Crabtree v Dono Textile Industries* (1988) 9 ILJ 119 (IC), *Cele v Bester Homes (Pty) Ltd* (1990) 11 ILJ 516 (IC), *Jacob v Prebuilt Products (Pty) Ltd* (1988) 9 ILJ 1199 (IC), *Hoogenoeg Andalusite (Pty) Ltd v National Union of Mineworkers* (1) (1992) 13 ILJ 87 (LAC), *Hendler & Hart (Pty) Ltd v National Union of Metalworkers of SA* (1994) 15 ILJ 1285 (LAC).

⁶⁴⁶ S 41(2) of the BCEA. Severance pay is often provided to an employee in a lump-sum award. This is disadvantageous because a lump-sum award, unlike a continuing benefit, can be quickly dissipated (ILO *Social Security for the Unemployed* (ILO (1976)) 27).

⁶⁴⁷ S 41(3) of the BCEA.

⁶⁴⁸ S 41(4) of the BCEA. See, for example, *Burger v Alert Engines Parts (Pty) Ltd* [1999] 1 BLLR 18 (LC).

3.3. Employment protection: Some observations

3.3.1. Employment protection is in the interest of both employers and their employees

Employment protection is mainly concerned about three issues, namely: protecting employees against unjustified dismissal, safeguarding – so far as possible – the well-being of those dismissed through no fault of their own, and ensuring the early reintegration of the discharged workers into the labour market.⁶⁴⁹ On the face of it, it seems as if employment protection favours employees much to the neglect of the employers. Nevertheless, as is evident from the foregoing discussion, this is for the most part incorrect. Employment protection strives at accommodating the legitimate needs and interests of both employees as well as their employers. For instance, it does not impose an unqualified ban against dismissals. Instead, it recognises that an employee's conduct or lack of capacity as well as an employer's operational requirements may effectively compel or require an employer to terminate an employee's contract of employment. Furthermore, it provides an employer with the right to place an employee on probation. This enables an employer to assess an employee prior to appointing the latter on permanent basis. The employers' discontent at employment protection is to a large extent unfounded.

3.3.2. Employees deserve protection against arbitrary employer behaviour

Gainful employment is one of *the* most common means through which individuals secure their welfare and that of their families. The dearth of a comprehensive unemployment protection system and escalating high unemployment in South Africa render employment even more valuable for workers and their families. This scenario has a perverse effect of tipping the employer-employee relations in favour of employers. A majority of employees in South Africa need their employers more than ever. This gives employers an edge over their employees in the sense that the former can afford to discharge and/or replace employees with relative ease. Indeed, it would be contrary to the spirit of the Constitution and international

⁶⁴⁹ Yemin E "Job security: Influence of ILO standards and recent trends" (1976) 113 *International Labour Review* 17 at 32-33.

instruments if employers are allowed to take advantage of their employees and dismiss them at will. It should be recalled that the present statutory employment protection framework is geared towards giving effect to the values and employment protection related rights contained in the Constitution and international law.⁶⁵⁰

3.3.3. Employment protection coverage is still restricted

It is evident that employment protection is an essential component of the South African unemployment protection system. Nevertheless, the scope of coverage of employment protection as contained in labour laws is restricted to those persons who fit the employee definition. Although they may still invoke the all-embracing constitutional right to fair labour practice to secure employment, most atypical workers are excluded and marginalised from the labour law (employment) protection system. This is regrettable for the fact that atypical work is one of the most precarious forms of employment in South Africa. To make matters worse, atypical workers are often among the least unionised categories of workers. To remedy this situation, it is suggested that trade unions be encouraged to help organise the informal economy. This could include, among others, assisting informal economy workers to organise themselves by means of capacity building exercises. Greater trade union involvement, it is opined, has a strong potential of providing informal economy workers with a voice to garner support for their inclusion under various employment protection measures. As regards the possibility of a constitutional challenge, it should be noted that a constitutional challenge involves financial resources and know-how which are not readily available to most excluded and marginalised groups – which atypical workers form part of. It is true that South Africa has endeavoured to extend the scope of labour law protection (which includes employment protection) to most workers. Nonetheless, more still needs to be done to ensure broader coverage. Furthermore, some of the mechanisms used to broaden coverage remain objectionable. For instance, the use of ministerial determinations to extend coverage bestows the power to expand labour law protection to an individual (the Minister) rather than the legislature. Furthermore, this method extends coverage slowly.

⁶⁵⁰ Article 23 of the Universal Declaration for Human Rights, for example, recognises the right all persons “to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”

4. SUMMARY

The Constitution of South Africa entrenches a variety of fundamental rights with far-reaching implications. It makes no express provision for the right to work. But such right may be implied from rights such as the right to fair labour practices and the right to choose one trade, occupation, or profession freely. These rights have, to large extent, the effect of securing the livelihood of workers. The state and employers have a duty to respect these rights. The state also has an obligation to give effect to these rights. By setting the statutory employment protection framework, it could be argued, the state is striving at fulfilling its constitutional duty to give effect to these rights. As shown in this chapter, it is doubtful if the current statutory employment framework is completely in compliance with Constitution. For example, the Constitution grants every person the right to fair labour practices. On the other hand, the statutory employment protection framework limits the right to labour practices to ‘employees’ as defined in labour laws. Although they may still invoke the all-embracing constitutional right to fair labour practice to secure the employment, most atypical workers are excluded and marginalised from the labour law (employment) protection. Although great strides have been made in extending employment protection, more still needs to be done to cover the excluded and marginalised workers. In the meantime, constitutional challenges against these exclusions remain a possibility. The disadvantage of extending employment protection through court cases is that litigation involves financial resources and know-how which are not always available to most excluded and marginalised groups. Another point is that it expands, similar to ministerial determinations, protection in a piece-meal fashion.

Furthermore, the Constitution provides every person with the right of access to social security – which includes social insurance and social assistance. It imposes a duty on the state, subject to the availability of resources, to give effect to the right of access to social security. In an attempt to satisfy this duty, South Africa covers the risk of being unemployed through an unemployment insurance scheme and, to a certain extent, through social assistance grants. Nevertheless, the unemployment insurance scheme, with its limited scope of coverage, is an inadequate measure to satisfy the unemployment protection needs of South

Africa. Plus, it has other imperfections. This assertion stems chiefly from the conspicuous absence of measures to (re)integrate the unemployed into the labour market; the absence of partial unemployment benefits (except in the case of domestic workers); and the continued exclusion of civil servants, certain categories of migrant workers and learners. There are also some definitional problems (particularly as regards dependants (e.g. 'surviving spouse')). Another point to be noted is that the South African unemployment insurance scheme also covers contingencies such as maternity and adoption. It is suggested that these risks be covered under a separate benefits system (i.e. family benefits systems) as they stretch the financial capacity of the UIF and divert the focus of the UIF from pressing issues such as preventing and combating unemployment.

On the other hand, the current social assistance grants – which are not directly aimed at unemployment and may be targeted at the poor and, to some extent, the unemployed – are largely categorical by nature, as they are only available to those who are (apart from being needy) young enough, disabled enough or old enough and are not able to work. The implication is clear – those unemployed persons who do not fit in one of the foregoing categories or never contributed to the unemployment insurance scheme or exhausted their unemployment insurance benefits are left at the mercy of poverty, as there are no universal benefits and/or state financed benefits (specifically targeted at the unemployed persons) available. In view of the insurance nature of the current scheme, the chapter argues that it cannot be expected of an unemployment insurance scheme to accommodate individuals who are not employed, such as the unemployed youth and women who are involved in unpaid care work. With a view of either introducing or expanding the scheme a detailed and extensive investigation should be conducted on one or a combination of the following tax financed alternatives, i.e. the introduction of universal benefits, the gradual extension of social assistance benefits and/or tax financed services or combining universal benefits with tax financed benefits or services.

Alongside the abovementioned typical unemployment protection schemes (unemployment insurance and social assistance), there are public programmes (i.e. public works programmes and skills development programmes) and coping strategies or mechanisms which minimise

the effect and impact of unemployment. These programmes and coping mechanisms are, as shown in this chapter, an important part of the South African unemployment protection system. Nevertheless, they have their own shortcomings. Starting with public programmes, the public works programmes – as pointed out in the chapter – do not provide a long-term solution to the problem of unemployment. And the prospects of (re)integrating those who participate in the public works programme into the labour market remain low. Another problem is that there is a risk that public works programmes could lure low-paid workers in the formal and informal economy workers. Skills development programmes are, on the other hand, more focused on the formal economy. They pay little or no attention to the training needs of the informal economy despite rising informal economy activities and high levels of vulnerability normally associated with that part of the economy. This insensitivity towards the training and skills development needs of the informal economy has negative results. The lack of or limited access to training and skills development effectively means that skills development in this sector will remain stagnant and unresponsive to the changing needs of the labour market. Consequently this has a negative impact on the (re)integration of informal economy participants into the formal economy. The absorption capacity of the South African formal economy is limited. In view of that, skills upgrading in the informal economy should be made an integral component of the overall skills strategy in South Africa. And, the reimbursement of portions of the skills development levies to employers has shown to be an insufficient incentive. This is problematic in the sense that it results in the under-utilisation of the Skills Development Funds. Another source of concern is South Africa's poor efforts to co-ordinate the private and public employment agencies. This requires urgent attention, particularly in view of the fact that there has been several direct requests from the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) to the government of South Africa to furnish it with information on the steps taken to co-ordinate the operation of public and private employment services as required in terms of *Unemployment Convention* (1919).

Focusing on informal coping mechanisms and strategies, informal social security is an important component of the South African unemployment protection system. Even so, it has its limitations and challenges. Informal coping mechanisms provide insufficient protection,

are unreliable, inconsistent and unstable, and are susceptible to external shocks. In light of these limitations and challenges, it is recommended that informal social security arrangements be strengthened. In the same vein, it needs to be stressed that the strengthening of these coping strategies does not mean that the government could abdicate its duty to provide access or create an appropriate social security framework for those who are excluded from formal social security coverage.

Finally, several non-exhaustive, but important, assumptions can be drawn from this chapter, i.e.: redesigning an unemployment protection system is not a task that can be realised overnight; an unemployment protection system grows and evolves over time; an ideal unemployment protection system for South Africa needs to embrace and radiate the ethos and values of the new constitutional dispensation; an unemployment protection system requires constant (re)evaluation; and such a system must address the particular labour market context.

CHAPTER 4

INTERNATIONAL, SUPRANATIONAL AND REGIONAL STANDARDS

1. INTRODUCTION: SOME GENERAL REMARKS

In this chapter the international (the International Labour Organisation (the ILO)), supranational (the European Union (the EU)) and European regional (the Council of Europe (the Council)) as well as the Southern African Development Community (the SADC)) standards pertaining to unemployment protection will be investigated. Any attempt to reform the South African (un)employment protection system without considering the international unemployment protection standards could be futile. Firstly, South Africa is a member of a variety of international organisations which include the ILO⁶⁵¹ and the SADC. By virtue of such membership, South Africa should – when reforming its unemployment protection system – consider the hard and soft law dealing with unemployment protection emanating from these organisations.⁶⁵² It should strive at ensuring that the redesigned unemployment protection system meets its international law obligations as well as the (unemployment protection and related) ethos and aspirations of the international organisations to which it belongs. To this end, the vast experience of the ILO, the Council of Europe and the European Union as regards unemployment protection (particularly in the area of social security coordination) is crucial in endeavours to redesign the South African unemployment protection system so as to ensure that it fits within the aspirations of SADC for an integrated region with co-ordinated social policies.⁶⁵³ Secondly, it should be recalled that South Africa

⁶⁵¹ South Africa joined the ILO in 1919. However, it was compelled to withdraw from the ILO in 1964 because of its apartheid policy (see Osieke E *Constitutional Law and Practice in the International Labour Organisation* (Martinus Nijhoff (1985)) 31-35 and *Declaration Concerning the Policy of "Apartheid" of the Republic of South Africa* – Adopted unanimously (by acclamation) by the International Labour Conference on July 8, 1964 – accessed at <http://www.anc.org.za/un/ilo-declaration.html>). It rejoined the ILO in 1994.

⁶⁵² See, generally, Eichenhofer E “Social security reform and the law” in Pieters D (ed) *Confidence and Changes: Managing Social Protection in the New Millennium* (Kluwer (2001)) 237.

⁶⁵³ See, generally, Olivier MP and Kalula ER “Regional social security” in Olivier MP *et al* (eds) *Introduction to Social Security* (LexisNexis/Butterworths (2004)) 183, Kalula E “Beyond borrowing and bending: Labour market regulation and the future of labour law in Southern Africa” in Barnard C *et al* (eds) *The Future of Labour Law* (Hart (2004)) 275, Olivier M “Regional social security: Are innovative developments in Southern Africa relevant to the European context?” in Pieters D (ed) *European Social Security and Global Politics* (Kluwer (2003)) 95, Olivier MP and Mpedi LG “Experiences from a comparative perspective: Employment and

has an international-law friendly Constitution. The Constitution requires the South African courts to consider international law⁶⁵⁴ when interpreting the ((un)employment protection and associated) rights entrenched in the Bill of Rights.⁶⁵⁵ Additionally, it instructs the South African courts, when interpreting ((un)employment protection) legislation, to “prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”⁶⁵⁶ With the foregoing in mind, this chapter endeavours to illustrate the relevance, the importance and the implications of international unemployment protections standards on attempts to redesign the South African unemployment protection system. In so doing, it is believed that the redesigned system will not only comply with the Constitution but will also adhere to the international law obligations of South Africa as well as internationally recognised unemployment protection best practices.

2. INTERNATIONAL LABOUR ORGANISATION

2.1. Introduction

2.1.1. Aims and purposes of the International Labour Organisation

The ILO, which is a United Nations Organisations (UN) specialised agency, was founded in 1919. One of the core features of the ILO is its tripartite structure⁶⁵⁷ comprising of

social protection in the Southern African Development Community (SADC)” Paper presented at the First Caribbean Labour Policy Conference, 2-5 April 2003, Olivier MP and Mpedi LG “Co-ordination and integration of social security in the SADC region: Developing the social dimension of economic co-operation and integration” (2003) 28 *Journal for Juridical Science* 10 and Olivier M “Social security for migrants: Does the European Union framework provide lessons for development in SADC?” in Berghman J *et al* (eds) *Social Security in Transition* (Kluwer (2002)) 107.

⁶⁵⁴ In *S v Makwanyane* ((1995) 3 SA 391 (CC) at paragraph 35) the Constitutional Court held that: “...international law would include non-binding as well as binding law. They may both be used...as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the European Commission on Human Rights, and the European Court on Human Rights, and in appropriate cases, reports of specialized agencies such as the international Labour Organization may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].”

⁶⁵⁵ S 39(1)(b) of the Constitution.

⁶⁵⁶ S 233 of the Constitution.

⁶⁵⁷ Tripartism is evident in the legislative, executive and supervisory structure and mechanisms of the ILO.

government, employers and workers.⁶⁵⁸ On of the implications of this tripartite structure is that governments, employers and workers are represented and their delegates can vote at the International Labour Conference. This conference is important for the reason that it establishes and adopts international labour standards. As at 17 March 2006, the ILO had 178 member states.⁶⁵⁹ The primary goal of the ILO is the adoption of international standards⁶⁶⁰ to address both labour and social problems. This is clear from the Constitution of the ILO (1919) and the Declaration of Philadelphia (1944).⁶⁶¹ This important ILO documents

⁶⁵⁸ This tripartism is hailed as both the strength and weakness of the ILO. According to Hagen (Hagen KA *The International Labour Organization: Can it deliver the Social Dimension of Globalization?* (Friedrich Ebert Stiftung (2003)) 14): “The concept that workplace issues should be resolved with the active involvement of employers and workers as well as governments has served the ILO well. It has shown how it is possible to channel the interests of non-governmental parties in representative and accountable structures of decision-making and implementation at the global level. And yet there has always been a paradox: how to fit all employer [and employee] interests of any country into a similarly representative organisation, while at the same time ensuring that these organisations are truly independent of the governments.”

⁶⁵⁹ See, for a complete list of ILO members states as well as dates of admission, ILO “ILOLEX: Member States” – accessed at <http://www.ilo.org/ilolex/english/mstatese.htm>. The last admission was on 7 March 2005.

⁶⁶⁰ Osieke E *Constitutional Law and Practice in the International Labour Organisation* (Martinus Nijhoff (1985)) 145.

⁶⁶¹ The Preamble of the Constitution of the ILO provides thus: “Whereas universal and lasting peace can be established only if it is based upon social justice; and whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures; whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries; the High Contracting Parties, moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world, and with a view to attaining the objectives set forth in this Preamble, agree to the following Constitution of the International Labour Organization.” The Declaration of Philadelphia, which was incorporated into the Constitution of the ILO in 1944, thus widening the ILO’s standard setting to include social policy, human and civil rights related issues, reaffirms the aims and purposes of the ILO. Article III of the Declaration of Philadelphia, regurgitates the obligation of the ILO to: “...further among the nations of the world programmes which will achieve: full employment and the raising of standards of living; the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being; the provision, as a means to the attainment of this end and under adequate guarantees for all concerned, of facilities for training and the transfer of labour, including migration for employment and settlement; policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection; the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures; the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care; adequate protection for the life and health of workers in all occupations; provision for child welfare and maternity protection; the provision of adequate nutrition, housing and facilities

embrace unemployment provisioning–related issues such as the *prevention of unemployment*, the *achievement of full employment* and the *raising of standards of living*.

2.1.2. Nature and form of international labour standards

The ILO international labour standards are adopted at the annually held International Labour Conference. The standard setting process is based on extensive preparatory work undertaken by the ILO office built around dialogue between the ILO member states and between the employers', workers' and government groups as well as between the International Labour Office and the aforementioned groups. These standards have four main characteristics, namely; *universality* – for the reason that they provide, to some extent, identical minimum standards which apply to almost all countries of the world; *specificity* – in view of the of the tripartite basis through which these international standards are drafted, negotiated and adopted, it could be argued that they are “intimately linked to economic, social and political realities”⁶⁶²; *comprehensiveness* – the ILO international standards cover a comprehensive range of subjects ranging from freedom of association to social security; and *flexibility* – for instance, the international standards provide member state with the latitude to select between alternative standards and some instruments permit developing countries, although for a brief period, to adopt lower standards than their developed counterparts.⁶⁶³

The international labour standards may, in principle, be divided into three categories, namely International Labour Conventions (the Conventions), International Labour Recommendations (the Recommendations) and less formal agreements (such as codes of conduct and resolutions). Conventions are international treaties and are subject to ratification by member states. Recommendations, unlike Conventions, are non-binding instruments which normally

for recreation and culture; the assurance of equality of educational and vocational opportunity.” See, for a historical background, Bartolomei de la Cruz HG “International labour law: Renewal or decline?” in von Maydell B and Nußberger A (eds) *Social Protection by Way of International Law: Appraisal, Deficits and Further Development* (Duncker & Humblot (1996)) 19 at 19-20, Valticos N and Von Potobsky G *International Labour Law* (Kluwer (1995)) 17-31 and Betten L *International Labour Law: Selected Issues* (Kluwer (1993)) 7-31.

⁶⁶² Pennings F and Schulte B “International social security standards: An overview” in Pennings F (ed) *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer (2006)) 1 at 12.

⁶⁶³ *Ibid* at 12-13.

deal with the same subjects as Conventions. Conventions and Recommendations may be classified by subject as follows: freedom of association, collective bargaining, and industrial relations;⁶⁶⁴ forced labour;⁶⁶⁵ elimination of child labour and protection of children and young persons;⁶⁶⁶ equality of opportunity and treatment;⁶⁶⁷ tripartite consultation;⁶⁶⁸ labour administration and inspection;⁶⁶⁹ employment policy and promotion;⁶⁷⁰ vocational guidance

⁶⁶⁴ The *Right of Association (Agriculture) Convention* 11 of 1921, the *Right of Association (Non-Metropolitan Territories) Convention* 84 of 1947, the *Freedom of Association and Protection of the Right to Organise Convention* 87 of 1948, the *Right to Organise and Collective Bargaining Convention* 98 of 1949, the *Workers' Representatives Convention* 135 of 1971, the *Rural Workers' Organisations Convention* 141 of 1975, the *Labour Relations (Public Service) Convention* 151 of 1978, the *Collective Bargaining Convention* 154 of 1981, the *Collective Agreements Recommendation* 91 of 1951, the *Voluntary Conciliation and Arbitration Recommendation* 92 of 1952, the *Co-operation at the Level of the Undertaking Recommendation* 94 of 1952, the *Consultation (Industrial and National Levels) Recommendation* 113 of 1960, the *Communications within the Undertaking Recommendation* 129 of 1967, the *Examination of Grievances Recommendation* 130 of 1967, the *Workers' Representatives Recommendation* 143 of 1971, the *Rural Workers' Organisations Recommendation* 149 of 1975, the *Labour Relations (Public Service) Recommendation* 159 of 1978 and the *Collective Bargaining Recommendation* 163 of 1981.

⁶⁶⁵ The *Forced Labour Convention* 29 of 1930, the *Abolition of Forced Labour Convention* 105 of 1957, the *Forced Labour (Indirect Compulsion) Recommendation* 35 of 1930 and the *Forced Labour (Regulation) Recommendation* 36 of 1930.

⁶⁶⁶ The *Minimum Age (Industry) Convention* 5 of 1919, the *Night Work of Young Persons (Industry) Convention* 6 of 1919, the *Minimum Age (Agriculture) Convention* 10 of 1921, the *(Shelved) Minimum Age (Trimmers and Stokers) Convention* 15 of 1921, the *Minimum Age (Non-Industrial Employment) Convention* 33 of 1932, the *Minimum Age (Industry) Convention (Revised)* 59 of 1937, the *(Shelved) Minimum Age (Non-Industrial Employment) Convention (Revised)* 60 of 1937, the *Medical Examination of Young Persons (Industry) Convention* 77 of 1946, the *Medical Examination of Young Persons (Non-Industrial Occupations) Convention* 78 of 1946, the *Night Work of Young Persons (Non-Industrial Occupations) Convention* 79 of 1946, the *Night Work of Young Persons (Industry) Convention (Revised)* 90 of 1948, the *Minimum Age (Underground Work) Convention* 123 of 1965, the *Medical Examination of Young Persons (Underground Work) Convention* 124 of 1965, the *Minimum Age Convention* 128 of 1973, and the *Worst Forms of Child Labour Convention* 182 of 1999.

⁶⁶⁷ The *Equal Remuneration Convention* 100 of 1951, the *Discrimination (Employment and Occupation) Convention* 111 of 1958, the *Workers with Family Responsibilities Convention* 156 of 1981, the *Equal Remuneration Recommendation* 90 of 1951, the *Discrimination (Employment and Occupation) Recommendation* 111 of 1958, the *Employment (Workers with Family Responsibilities) Recommendation* 123 of 1965 and the *Workers with Family Responsibilities Recommendation* 165 of 1981.

⁶⁶⁸ The *Tripartite Consultation (International Standards) Convention* 144 of 1976 and the *Tripartite Consultation (Activities of the International Labour Organisation) Recommendation* 152 of 1976.

⁶⁶⁹ The *Convention Concerning Statistics of Wages and Hours of Work* 63 of 1938, the *Labour Inspection Convention* 81 of 1947, the *Labour Inspectorates (Non-Metropolitan Territories) Convention* 85 of 1947, the *Labour Inspection (Agriculture) Convention* 129 of 1969, the *Labour Administration Convention* 150 of 1978, the *Labour Statistics Convention* 160 of 1985, the *Protocol of 1995 to the Labour Inspection Convention* 81 of 1947, the *Labour Inspection Recommendation* 20 of 1923, the *Labour Inspection Recommendation* 81 of 1947, the *Labour Inspection (Mining and Transport) Recommendation* 82 of 1947, the *Labour Inspection (Agriculture) Recommendation* 133 of 1969, the *Labour Administration Recommendation* 158 of 1978, and the *Labour Statistics Recommendation* 170 of 1985.

⁶⁷⁰ The *Unemployment Convention* 2 of 1919, the *Employment Promotion and Protection against Unemployment Convention* 168 of 1988, the *Employment Promotion and Protection against Unemployment Recommendation* 176 of 1988, the *(Shelved) Fee-Charging Employment Agencies Convention* 34 of 1933, the *Employment Service Convention* 88 of 1948, the *Fee-Charging Employment Agencies Convention (Revised)* 96 of 1949, the *Employment Policy Convention* 122 of 1964, the *Vocational Rehabilitation and Employment*

and training;⁶⁷¹ employment security;⁶⁷² wages;⁶⁷³ working time;⁶⁷⁴ occupational safety and health;⁶⁷⁵ social security;⁶⁷⁶ maternity protection;⁶⁷⁷ social policy;⁶⁷⁸ migrant workers;⁶⁷⁹

(*Disabled Persons*) Convention 159 of 1983, the *Private Employment Agencies Convention* 181 of 1997, the *Elimination of Recruiting Recommendation* 46 of 1936, the *Employment (Transition from War to Peace) Recommendation* 71 of 1944, the *Employment Service Recommendation* 83 of 1948, the *Vocational Rehabilitation (Disabled) Recommendation* 99 of 1955, the *Employment Policy Recommendation* 122 of 1964, the *Vocational Rehabilitation and Employment (Disabled Persons) Recommendation* 168 of 1983, *Employment Policy (Supplementary Provisions) Recommendation* 169 of 1984, the *Private Employment Agencies Recommendation* 188 of 1997, the *Job Creation in Small and Medium-Sized Enterprises Recommendation* 189 of 1998 and the *Promotion of Cooperatives Recommendation* 193 of 2002.

⁶⁷¹ The *Paid Educational Leave Convention* 140 of 1974, the *Human Resources Development Convention* 142 of 1975, the *Vocational Training Recommendation* 57 of 1939, the *Apprentice Recommendation* 60 of 1939, the *Vocational Guidance Recommendation* 87 of 1949, the *Vocational Training (Adult) Recommendation* 88 of 1950, the *Vocational Training (Agriculture) Recommendation* 101 of 1956, the *Vocational Training Recommendation* 117 of 1962, the *Special Youth Schemes Recommendation* 136 of 1970, the *Paid Educational Leave Recommendation* 148 of 1974, and the *Human Resources Development Recommendation* 150 of 1975.

⁶⁷² The *Termination of Employment Convention* 158 of 1982, the *Termination of Employment Recommendation* 119 of 1963 and the *Termination of Employment Recommendation* 166 of 1982.

⁶⁷³ The *Minimum Wage-Fixing Machinery Convention* 26 of 1928, the *Labour Clauses (Public Contracts) Convention* 94 of 1949, the *Protection of Wages Convention* 95 of 1949, the *Minimum Wage Fixing Machinery (Agriculture) Convention* 99 of 1951, the *Minimum Wage Fixing Convention* 131 of 1970, the *Protection of Workers' Claims (Employer's Insolvency) Convention* 173 of 1992, the *Minimum Wage-Fixing (Machinery) Recommendation* 30 of 1928, the *Labour Clauses (Public Contracts) Recommendation* 84 of 1949, the *Protection of Wages Recommendation* 85 of 1949, the *Minimum Wage Fixing Machinery (Agriculture) Recommendation* 89 of 1951, the *Minimum Wage Fixing Recommendation* 135 of 1970 and the *Protection of Worker's Claims (Employer's Insolvency) Recommendation* 180 of 1992.

⁶⁷⁴ The *Hours of Work (Industry) Convention* 1 of 1919, the (*Shelved*) *Night Work (Women) Convention* 4 of 1919, the *Weekly Rest (Industry) Convention* 14 of 1921, the *Forty-Hour Week Convention* 47 of 1935, the *Holidays with Pay Convention* 52 of 1936, the *Night Work (Women) Convention (Revised)* 89 of 1948, the *Night Work Convention* 171 of 1990, the *Part-Time Work Convention* 175 of 1994, the *Holidays with Pay Recommendation* 47 of 1936, the *Night Work Recommendation* 178 of 1990 and the *Part-Time Work Recommendation* 182 of 1994.

⁶⁷⁵ The *Radiation Protection Convention* 115 of 1960, the *Radiation Protection Recommendation* 114 of 1960, the *Occupational Cancer Convention* 139 of 1974, the *Occupational Cancer Recommendation* 147 of 1974, the *Working Environment (Air Pollution, Noise and Vibration) Convention* 148 of 1977, the *Working Environment (Air Pollution, Noise and Vibration) Recommendation* 156 of 1977, the *Chemicals Convention* 170 of 1990, the *Chemicals Recommendation* 177 of 1990, the *Prevention of Major Industrial Accidents Convention* 174 of 1993, the *Prevention of Major Industrial Accidents Recommendation* 181 of 1993, the *Hygiene (Commerce and Offices) Convention* 120 of 1964, the *Hygiene (Commerce and Offices) Recommendation* 120 of 1964, the *Occupational Safety and Health Convention* 155 of 1981, the *Occupational Health Services Convention* 161 of 1985, the *Asbestos Convention* 162 of 1986, the *Asbestos Recommendation* 172 of 1986, the *Safety and Health in Construction Convention* 167 of 1988, the *Safety and Health in Mines Convention* 176 of 1995, the *Safety and Health in Agriculture Convention* 184 of 2001, the *Prevention of Industrial Accidents Recommendation* 31 of 1929, the *Protection of Workers' Health Recommendation* 97 of 1953, the *Welfare Facilities Recommendation* 112 of 1959, the *Occupational Safety and Health Recommendation* 164 of 1981 and the *Safety and Health in Mines Recommendation* 183 of 1995.

⁶⁷⁶ The *Workmen's Compensation (Agriculture) Convention* 12 of 1921, the *Workmen's Compensation (Accidents) Convention* 17 of 1925, the *Workmen's Compensation (Occupational Diseases) Convention* 18 of 1925, the *Equality of Treatment (Accident Compensation) Convention* 19 of 1925, the *Sickness Insurance (Industry) Convention* 24 of 1927, the *Sickness Insurance (Agriculture) Convention* 25 of 1927, the *Workmen's Compensation (Occupational Diseases) Convention (Revised)* 42 of 1934, the (*Shelved*) *Unemployment Provision Convention* 44 of 1934, the *Social Security (Minimum Standards) Convention* 102 of 1952, the *Equality Treatment (Social Security) Convention* 118 of 1962, the *Employment Injury Benefits Convention* 121

seafarers;⁶⁸⁰ fishermen;⁶⁸¹ dockworkers;⁶⁸² indigenous and tribal peoples;⁶⁸³ specific categories of workers⁶⁸⁴ and others.⁶⁸⁵ The following Conventions have been classified as current conventions: the *Social Security (Minimum Standards) Convention*, the *Equality of Treatment (Social Security) Convention*, the *Employment Injury Benefits Convention*, *Invalidity, Old-Age and Survivor's Benefits Convention*, the *Medical Care and Sickness Benefits Convention*, the *Maintenance of Social Security Rights Convention*, the *Employment Promotion and Protection against Unemployment Convention* and the *Maternity Protection Convention*. The effect of such a classification is that new social security international

of 1964, the *Invalidity, Old-Age and Survivors' Benefits Convention* 128 of 1967, the *Medical Care and Sickness Benefits Convention* 130 of 1969, the *Maintenance of Social Security Rights Convention* 157 of 1982, the *Employment Promotion and Protection against Unemployment Convention* 168 of 1988, the *Workmen's Compensation (Occupational Diseases) Recommendation* 24 of 1925, the *Sickness Insurance Recommendation* 29 of 1927, the *Unemployment Provision Recommendation* 44 of 1934, the *Income Security Recommendation* 67 of 1944 and the *Employment Promotion and Protection against Unemployment Recommendation* 176 of 1988.

⁶⁷⁷ The *Maternity Protection Convention* 3 of 1919, the *Maternity Protection Convention (Revised)* 103 of 1952, the *Maternity Protection Convention* 183 of 2000, the *Maternity Protection (Agriculture) Recommendation* 12 of 1921, the *Maternity Protection Recommendation* 95 of 1952 and the *Maternity Protection Recommendation* 191 of 2000.

⁶⁷⁸ The *Social Policy (Non-Metropolitan Territories) Convention* 82 of 1947, the *Social Policy (Basic Aims and Standards) Convention* 117 of 1962, the *Social Policy in Dependent Territories Recommendation* 70 of 1944, the *Social Policy in Dependent Territories (Supplementary Provisions) Recommendation* 74 of 1945, the *Workers' Housing Recommendation* 115 of 1961 and the *Co-operatives (Developing Countries) Recommendation* 127 of 1966.

⁶⁷⁹ The *Migration for Employment Convention (Revised)* 97 of 1949, the *Migrant Workers (Supplementary Provisions) Convention* 143 of 1975, the *Reciprocity of Treatment Recommendation* 2 of 1919, the *Migration for Employment Recommendation* 61 of 1939, the *Migration for Employment Recommendation (Revised)* 86 of 1949, the *Protection of Migrant Workers (Underdeveloped Countries) Recommendation* 100 of 1955 and the *Migrant Workers Recommendation* 151 of 1975.

⁶⁸⁰ The *Minimum Age (Sea) Convention* 7 of 1920, the *Unemployment Indemnity (Shipwreck) Convention* 8 of 1920, the *Sickness Insurance (Sea) Convention* 56 of 1936, the *Minimum Age (Sea) Convention (Revised)* 58 of 1936, the *Seafarers' Welfare Convention* 163 of 1987, the *Social Security (Seafarers) Convention (Revised)* 165 of 1987, the *Unemployment Insurance (Seamen) Recommendation* 10 of 1920, the *Seafarers' Social Security (Agreement) Recommendation* 75 of 1946, the *Seafarers' Social Welfare Recommendation* 138 of 1970 and the *Seafarers' Welfare Recommendation* 173 of 1987.

⁶⁸¹ The *Minimum Age (Fishermen) Convention* 112 of 1959, the *Medical Examination (Fishermen) Convention* 113 of 1959, the *Hours of Work (Fishing) Recommendation* 7 of 1920 and the *Vocational Training (Fishermen) Recommendation* 126 of 1966.

⁶⁸² The *Dock Work Convention* 137 of 1973, the *Occupational Safety and Health (Dock Work) Convention* 152 of 1979, the *Dock Work Recommendation* 145 of 1973 and the *Occupational Safety and Health (Dock Work) Recommendation* 160 of 1979.

⁶⁸³ The *(Shelved) Recruiting of Indigenous Workers Convention* 50 of 1936, the *(Shelved) Contracts of Employment (Indigenous Workers) Convention* 64 of 1939, the *(Shelved) Contracts of Employment (Indigenous Workers) Convention* 86 of 1947 and the *Contracts of Employment (Indigenous Workers) Recommendation* 58 of 1939.

⁶⁸⁴ The *Home Work Convention* 177 of 1996, the *Nursing Personnel Recommendation* 157 of 1977, the *Older Workers Recommendation* 162 of 1980 and the *Home Work Recommendation* 184 of 1996.

⁶⁸⁵ The *Final Articles Revision Convention* 80 of 1946 and *Final Articles Revision Convention* 116 of 1961.

standards now must take the content of the eight current Conventions into account before they are adopted.⁶⁸⁶ It should be pointed out that the ratification record of social security conventions is disappointing.⁶⁸⁷ To address this situation, the ILO could launch a campaign to promote the ratification of social security Conventions (particularly the up-to-date instrument). Such a campaign could be modelled along the lines of the one it launched in May 1995 to promote the ratification of the ILO fundamental Conventions. The fundamental Conventions cover *freedom of association and the right to collective bargaining* (*Freedom of Association and Protection of the Right to Organize Convention* 87 of 1948 and *Right to Organize and Collective Bargaining Convention* 98 of 1949), forced labour (*Forced Labour Convention* 29 of 1930 and *Abolition of Forced Labour Convention* 105 of 1957), discrimination in employment and occupation (*Equal Remuneration Convention* 100 of 1951 and *Discrimination (Employment and Occupation) Convention* 111 of 1958) and child labour (*Minimum Age Convention* 138 of 1973 and *Worst Forms of Child Labour Convention* 182 of 1999).⁶⁸⁸ It is important to note that these Conventions “have been identified by the ILO's Governing Body as being fundamental to the rights of human beings at work, irrespective of levels of development of individual member states.”⁶⁸⁹

Apart from the Conventions and Recommendations there are less formal agreements, in contrast to Conventions and Recommendations, which are often agreed to at the annual International Labour Conference and by other ILO bodies. These documents include, among others, codes of conduct, resolutions and declarations.

⁶⁸⁶ See, ILO “International labour standards by subject” – accessed at <http://www.ilo.org>, Kulke U “Overview of up-to-date ILO social security conventions” in Pennings F (ed) *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer (2006)) 27 and Javillier J-C “The impact of international social security standards” Conference on the ISSA Initiative, Vancouver, Canada, 10-12 September 2002.

⁶⁸⁷ For example, the *Social Security (Minimum Standards) Convention* (which is one of the most important social security conventions) has, as on 28 June 2006, only been ratified by 42 countries.

⁶⁸⁸ South Africa has ratified of the fundamental Conventions.

⁶⁸⁹ ILO “Fundamental ILO Conventions – International labour standards” – accessed at <http://www.ilo.org>.

2.1.3. Enforcement of international labour standards within the ILO structure

There are three mechanisms used to enforce international labour standards set within the ILO framework, i.e.: the regular system of supervision, the special systems of supervision, and *ad hoc* mechanisms.

2.1.3.1. Regular system of supervision

The Constitution of the ILO requires each and every member state to submit a report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party.⁶⁹⁰ Whereas article 22 of Constitution of the ILO directs that the aforementioned reports shall be submitted on an annual basis, through the years this has changed. The change in the periodicity of reporting has been necessitated by the increase in the number of Conventions and ratifications which made the entire process of reporting cumbersome for both the governments and the ILO. To deal with this situation, it was resolved that detailed reports of important Conventions (for example, those dealing with human rights) shall be requested every other year whereas for other Conventions reports shall be requested after every five year period.⁶⁹¹ Despite the periodic reporting by governments, the Committee of Experts on the Application of Conventions and Recommendations (the Committee of Experts), i.e. a committee which carries out the first examination of the reports submitted by governments, may request a government to submit its report before the due date after being prompted to do so by workers' or employers' organisations. In an event of non-compliance with obligations imposed by a Convention or even the Constitution of ILO the Committee of Experts shall draw the attention of the

⁶⁹⁰ Article 22 of the Constitution of the ILO. See Pennings F and Schulte B "International social security standards: An overview" in *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer (2006)) 1 at 15-18, Oates S "International labour standards: The challenges of the 21st century" in Blanpain R and Engels C (eds) *The ILO and the Social Challenges of the 21st Century: The Geneva Lectures* (Kluwer (2001)) 93 at 98-101, Rood M "New developments within the ILO supervisory system" in Blanpain R (ed) *Labour Law, Human Rights and Social Justice* (Kluwer (2001)) 87 at 88-89, Vukas B "The diverse supervisory procedures in a comparison" in von Maydell B and Nußberger A (eds) *Social Protection by Way of International Law: Appraisal, Deficits and Further Development* (Duncker & Humblot (1996)) 105 at 115 and Betten L *International Labour Law: Selected Issues* (Kluwer (1993)) 396-397.

⁶⁹¹ ILO "Explanation of the regular system of supervision" – accessed at <http://www.ilo.org>. See, for a list of years in which periodic reports are due, ILO "Handbook of procedures relating to international labour Conventions and Recommendations" – accessed at <http://www.ilo.org>.

government concerned to its finding(s) of non-compliance and request it to take steps to rectify same. The report of the Committee of Experts on its findings regarding reports of governments is further discussed and examined at the International Labour Conference by the tripartite Conference Committee on the Application of Conventions and Recommendations. Governments which failed to comply with their obligations may be summoned to make a statement to the Conference Committee. It should be noted that ILO member states to submit reports on Conventions they have not accepted. Article 19 of the ILO Constitution require member states to report at regular intervals (at the request of the Governing Body) on measures they have taken to give effect to any provision of certain Conventions or Recommendations and to indicate any obstacles which have prevented or delayed the ratification of a particular Convention.

2.1.3.2. Special systems of supervision

The special systems of supervision⁶⁹² are, generally speaking, initiated by means of a complaint against a member state. This complaint, alleging non-compliance on the part of a member state could be lodged by another ratifying member state in accordance with article 26 of the Constitution of the ILO (by alleging that a member state is not satisfactorily securing the effective application of an ILO Convention which it has ratified) or an International Labour Conference delegate in terms of article 24 of the Constitution of the ILO (by making a so-called ‘representation’ that a particular member state of the ILO has failed to apply an ILO Convention which it has ratified) or the Governing Body itself. It should be borne in mind that the procedure provided for in accordance with articles 24 and 26 requires that the Convention concerned be ratified. Nevertheless, complaints filed alleging the violation of freedom of association principles do not require any ratification of the Conventions in question.⁶⁹³

⁶⁹² See Pennings F and Schulte B “International social security standards: An overview” in *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer (2006)) 1 at 19-20 and Rood M “New developments within the ILO supervisory system” in Blanpain R (ed) *Labour Law, Human Right and Social Justice* (Kluwer (2001)) 87 at 89-90.

⁶⁹³ The Fact-Finding and Conciliation Commission on Freedom of Association is empowered to examine complaints of infringement of trade union rights referred to it by the Governing Body of the ILO. It has the power to examine complaints involving countries that have ratified the freedom of association Conventions as well as countries that have not. It should be noted that in the case of countries that have not ratified the

2.1.3.3. *Ad hoc* supervisory mechanisms

The *ad hoc* supervisory mechanisms comprise mainly of those *ad hoc* measures⁶⁹⁴ adopted by the ILO to enforce international standards. These measures come into being through resolutions of the International Labour Conference and/or Governing Body decisions.⁶⁹⁵

2.1.3.4. Some observations

The ILO supervisory machinery has been described as being “in a state of profound crisis”.⁶⁹⁶ This situation is compounded by, among others, the fact that: “The existing machinery cannot cope with the volume of material generated by ratifying States.”⁶⁹⁷ Additionally, it is reported that: “Many ratifying states do not furnish Article 22 and Article 19 reports when due. In some instances this is indicative of a lack of commitment. More often it reflects the fact that many developing countries simply do not have the resources to collect the requisite information (even assuming that it is available), and then to put it into the form required by bureaucrats in far-away Geneva. Similarly, trade unions and employer

Conventions, referral may not be made without the permission of the country concerned (ILO “Fact-Finding and Conciliation Commission on Freedom of Association” – accessed at <http://www.ilo.org/public/english/standards/norm/enforced/foa/ffcc.htm>).

⁶⁹⁴ These measures include: Ad Hoc procedures – “The ILO has, from time to time, also carried out various ad hoc procedures. These include the long series of Director-General's reports on the effect given to the Declaration concerning Action against Apartheid (no longer prepared), and on the situation of workers in the occupied Arab territories; both were, or are, submitted directly to the Conference for discussion. Other procedures, including various kinds of special studies, have been used on various occasions” (ILO “Ad hoc supervisory mechanisms – International labour standards” – accessed at <http://www.ilo.org>). (b) Direct contacts – “Under a procedure adopted in 1964, a country may request direct contacts to discuss questions raised by the supervisory bodies. In such cases, the Director-General appoints a representative - who may be an official of the Office or an independent person – to discuss the situation with the government concerned and with the tripartite partners in the country. In such cases, the operation of the supervisory system is suspended for one year to allow a solution to the difficulty to be found” (ILO “Ad hoc supervisory mechanisms – International labour standards” – accessed at <http://www.ilo.org>). (c) Special Studies on Discrimination – “In 1973 the Governing Body adopted a procedure for special studies on discrimination, which has not yet been used successfully. Under this procedure, a request for a special study may be submitted by a member State or by an organization of employers or of workers on specific questions which concern them. If the government concerned agrees to such a study, the Director General is to examine with it the arrangements for carrying it out. It is not confined to countries having ratified any particular ILO Conventions” (ILO “Ad hoc supervisory mechanisms – International labour standards” – accessed at <http://www.ilo.org>).

⁶⁹⁵ ILO “Ad hoc supervisory mechanisms – International labour standards” – accessed at <http://www.ilo.org>.

⁶⁹⁶ Creighton B “The future of labour law: Is there a role for the international labour standards?” in Barnard C and Deakin S (eds) *The Future of Labour Law* (Hart (2004)) 253 at 261.

⁶⁹⁷ *Ibid.*

organisations in many countries do not have the resources and/or inclination rigorously to scrutinise the Reports prepared by their governments, and then to provide their comments to the [International Labour] Office.”⁶⁹⁸

2.1.4. Influence of international labour standards

The influence of international standards operates at two levels – that is at an *international level* and at a *national level*. At an international level, the influence of international standards can be detected from a majority of regional instruments which are either structured along the lines of or embrace the provisions of the ILO Conventions and/or Recommendations. The *European Social Charter* (1961), for example, “...is structured along the lines of ILO [*Social Security (Minimum Standards) Convention*], i.e. a minimum number of provisions that ratifying states must apply and a series of optional provisions. As to its content, the Charter reproduced the basic provisions of the most important ILO Conventions and Recommendations existing at the time, particularly with regard to fundamental human rights (freedom of association, abolition of forced labour and equality of opportunity, and treatment).”⁶⁹⁹ In addition, the *Charter of Fundamental Social Rights in SADC* (2003), “embodies the recognition by governments, employers and workers in the Region of the universality and indivisibility of basic human rights proclaimed in instruments such as the *United Nations Universal Declaration of Human Rights*, the *African Charter on Human and Peoples’ Rights*, the Constitution of the ILO, the *Philadelphia Declaration* and other relevant international instruments.”⁷⁰⁰ It also requires the member states to create an enabling environment consistent with ILO Conventions on freedom of association, the right to organise and collective bargaining;⁷⁰¹ discrimination and equality;⁷⁰² minimum entry into employment;⁷⁰³ and paid education and training.⁷⁰⁴

⁶⁹⁸ *Ibid* 262.

⁶⁹⁹ Bartolomei de la Cruz HG “International labour law: Renewal or decline?” in von Maydell B and Nußberger A (eds) *Social Protection by Way of International Law: Appraisal, Deficits and Further Development* (Duncker & Humblot (1996)) 19 at 34.

⁷⁰⁰ Article 3(1) of the *Charter of Fundamental Social Rights in SADC* (2003).

⁷⁰¹ Article 4 of the *Charter of Fundamental Social Rights in SADC*.

⁷⁰² Article 6 of the *Charter of Fundamental Social Rights in SADC*.

⁷⁰³ Article 7 of the *Charter of Fundamental Social Rights in SADC*.

⁷⁰⁴ Article 15 of the *Charter of Fundamental Social Rights in SADC*.

At a national level, international standards are often reflected in national laws.⁷⁰⁵ When new laws are enacted, lawmakers often couch them so as to reflect their international obligations which they incurred by virtue of their membership of the ILO or after having ratified Conventions.⁷⁰⁶ Lawmakers amend laws to set them in conformity with international standards. This happens often after having ratified a convention. In addition, the Committee on Freedom of Association, ILO technical assistance in national labour and social security laws and codes, Recommendations flowing from cases of representations, and complaints examined by the Fact-Finding and Conciliation Commission on Freedom of Association⁷⁰⁷ also play a role in influencing national laws.⁷⁰⁸

2.2. ILO international labour standards and (un)employment protection

2.2.1. Introduction

From its inception, the ILO has displayed some deep commitment to ensuring that its member states strive towards the achievement of (un)employment protection in their respective countries. This is apparent from a series of ILO international labour standards (discussed below) which are dedicated towards ensuring, *inter alia*, income security, labour market security, employment security and work security.

⁷⁰⁵ See Pennings F (ed) *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer (2006)). Also see Tómes I “The viewpoint of national states – Czech republic” in Jorens Y (ed) *The Influence of International Organizations on National Social Security Law in the European Union: The Example of Old-age Pension* (Nomos (2002)) 73 at 76-79, Nußberger A “Die Wirkungsweise internationaler und supranationaler Normen in Bereich des Arbeit- und Sozialrechts” in Ekonomi M *et al* (eds) *Der Einfluss internationalen Rechts auf das türkische und das deutsche Arbeits- und Sozialrecht* (Nomos (2003)) 43, Güzel A “Der Einfluss der internationalen und supranationalen Normen auf dem Gebiet des Arbeits- und Sozialrechts” in Ekonomi M *et al* (eds) *Der Einfluss internationalen Rechts auf das türkische und das deutsche Arbeits- und Sozialrecht* (Nomos (2003)) 17 and Hohnerlein EM “Der Einfluss des internationalen und supranationalen Rechts auf das deutsche Sozialrecht” in Ekonomi M *et al* (eds) *Der Einfluss internationalen Rechts auf das türkische und das deutsche Arbeits- und Sozialrecht* (Nomos (2003)) 85.

⁷⁰⁶ See, for example, the Preamble of the LRA (South Africa) and the Preamble of the EEA (South Africa).

⁷⁰⁷ For example, the South African *Labour Relations Act* has, to certain extent, been influenced by the *Fact-Finding and Conciliation Commission Report: South Africa* (1992).

⁷⁰⁸ See Bartolomei de la Cruz HG “International labour law: Renewal or decline?” in von Maydell B and Nußberger A (eds) *Social Protection by Way of International Law: Appraisal, Deficits and Further Development* (Duncker & Humblot (1996)) 19 at 35-36.

2.2.2. Unemployment protection

2.2.2.1. Nature of the contingency covered

There are several key ILO Conventions and Recommendations which make provision for unemployment protection. These Conventions and Recommendations include, among others, the following: the *Unemployment Convention* 2 of 1919;⁷⁰⁹ the *Unemployment Provision Convention* 44 of 1934;⁷¹⁰ the *Unemployment Provision Recommendation* 44 of 1934; the *Income Security Recommendation* 67 of 1944; the *Social Security (Minimum Standards) Convention* 102 of 1952;⁷¹¹ the *Employment Promotion and Protection against Unemployment Convention* 168 of 1988;⁷¹² and the *Employment Promotion and Protection against Unemployment Recommendation* 176 of 1988. Some of the foregoing instruments⁷¹³ endeavour to outline the nature of the contingency they are covering. An assessment of ILO Conventions and Recommendations dealing with unemployment protection illustrates that the nature of the contingency covered varies from one instrument to the other: the *Unemployment Convention* (1919) – does not specify the nature of the contingency; the *Unemployment Provision Convention* (1934) – involuntary loss of employment⁷¹⁴ and partial unemployment;⁷¹⁵ the *Unemployment Provision Recommendation* (1934) – full and partial unemployment;⁷¹⁶ the *Income Security Recommendation* (1944) – loss of earnings;⁷¹⁷ the

⁷⁰⁹ South Africa is, as on 17 March 2006, among the fifty-five countries which ratified this Convention (ILO “ILOLEX: Database of international standards” – accessed at <http://www.ilo.org>).

⁷¹⁰ This Convention has, as on 17 March 2006, been ratified by fourteen countries and denounced by two countries. South Africa has not ratified it (ILO “ILOLEX: Database of international standards” – accessed at <http://www.ilo.org>).

⁷¹¹ Part IV – Unemployment Benefit. As of 17 March 2006, the number of countries that ratified this Convention stood at forty-one – South Africa excluded (ILO “ILOLEX: Database of international standards” – accessed at <http://www.ilo.org>).

⁷¹² By 17 March 2006 six countries ratified this Convention, namely: Brazil (24 March 1993), Finland (19 December 2004), Norway (19 June 1990), Romania (15 December 1992), Sweden (18 December 1990) and Switzerland (17 October 1990) (ILO “ILOLEX: Database of international standards” – accessed at <http://www.ilo.org>).

⁷¹³ Notably the *Unemployment Provision Convention*; the *Unemployment Provision Recommendation*; the *Income Security Recommendation*; the *Social Security (Minimum Standards) Convention* and the *Employment Promotion and Protection against Unemployment Convention*.

⁷¹⁴ Article 1(1) of the *Unemployment Provision Convention*.

⁷¹⁵ Article 3 of the *Unemployment Provision Convention*.

⁷¹⁶ Paragraph 3 of the *Unemployment Provision Recommendation*.

⁷¹⁷ Paragraph 14 of the *Income Security Recommendation*.

Social Security (Minimum Standards) Convention (1952) – (includes, but is not limited to) suspension of earnings;⁷¹⁸ and the *Employment Promotion and Protection against Unemployment Convention* (1988) – full unemployment,⁷¹⁹ partial unemployment⁷²⁰ and suspension of work or reduction of earnings due to temporary suspension of work.⁷²¹ Despite the foregoing variety of contingencies covered, coverage against full and partial unemployment appear to dominate. It is worth mentioning that the *Employment Promotion and Protection against Unemployment Convention* which is one of the so-called up-to-date conventions in the social security field expressly mentions full and partial unemployment as some of the contingencies to be covered. The same contingencies may be implied from the *Social Security (Minimum Standards) Convention*⁷²² (which is also an up-to-date Convention in the social security sphere⁷²³). Nevertheless, the contingency covered under the South African unemployment insurance system is limited to, in the case of contributors other than domestic workers,⁷²⁴ full unemployment. This is unfortunate – particularly when one considers the fact that the contingency covered under the previous UIA included partial unemployment.⁷²⁵ The drawback of this current situation is that it: “...loses sight of the policy consideration that a person who is allowed to retain benefits while commencing some (part-time) employment will, hopefully, gradually again become independent of the [Unemployment Insurance] Fund. It furthermore loses sight of another policy consideration, namely that somebody who has made contributions during the period of occupying a particular position, should in principle be entitled to claim benefits if that particular position

⁷¹⁸ Article 20 of the *Social Security (Minimum Standards) Convention*.

⁷¹⁹ Article 10(1) of the *Employment Promotion and Protection against Unemployment Convention*.

⁷²⁰ Article 10(2).

⁷²¹ *Ibid.*

⁷²² Article 20 of the *Social Security (Minimum Standards) Convention* provides that the contingency to be covered shall include the suspension of earnings. This means, it is opined, other contingencies such as full and partial unemployment could be added to the suspension of earnings.

⁷²³ See ILO “International labour standards by subject” – accessed at <http://www.ilo.org> and Kulke U “Overview of up-to-date ILO social security conventions” in Pennings F (ed) *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer (2006)) 27.

⁷²⁴ In accordance with s 12(1A) of the UIA (as amended by the *Unemployment Insurance Amendment Act 32 of 2003*): “A contributor who is employed as a domestic worker by more than one employer and whose employment is terminated by one or more employers is, despite still being employed, entitled to benefits in terms of this Act [UIA] if the contributor’s total income falls below the benefit level that the contributor would have received if he or she had become wholly unemployed.”

⁷²⁵ Van Kerken ET and Olivier MP “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 448.

is lost.”⁷²⁶ South Africa should broaden the nature of the contingency covered under its unemployment insurance scheme and include partial unemployment for all insured employees. In any event, this was the situation prior to the introduction of the current UIA. The broadening of the contingency covered will assist in maintaining the employment relationship in the sense that employers will be enabled to retain a skilled and experienced work force while workers avoid (full) unemployment.⁷²⁷ This will put the nature of the contingency covered under the unemployment insurance system more in line with that of the up-to-date conventions in the unemployment protection field – particularly the *Employment Promotion and Protection against Unemployment Convention*.

2.2.2.2. Personal scope of coverage

(a) Unemployment Convention (1919)

The *Unemployment Convention* requires member states which have ratified this Convention to treat non-citizens on the same basis as citizens regarding access to unemployment insurance. Article 3 of this Convention requires members of the ILO which have ratified it to “make arrangements whereby workers belonging to one Member and working in the territory of another shall be admitted to the same rates of benefit of such insurance as those which obtain for the workers belonging to the latter.” In other words, member states which have ratified this Convention are required to enter into bilateral agreements and/or pass national legislation providing for the equality of treatment as regards the unemployment benefit schemes.⁷²⁸ The equal treatment granted under this Convention is based on the principle of reciprocity. South Africa, which is one of the countries which have ratified this Convention, is yet to be covered by a network of bilateral agreements envisaged by the aforementioned instrument. In addition, its unemployment insurance laws exclude non-citizen fixed-term

⁷²⁶ *Ibid.*

⁷²⁷ ILO *Social Security for the Unemployed* (ILO (1976)) 28.

⁷²⁸ Equality of treatment as regards the unemployment benefit schemes is provided for in the following up-to-date ILO instruments: article 68 of the *Social Security (Minimum Standards) Convention* 102 of 1952, article 6 of the *Employment Promotion and Protection against Unemployment Convention* 168 of 1988, the *Equality of Treatment (Social Security) Convention* 118 of 1962, article 6(1) of the *Migration for Employment Convention (Revised)* 97 of 1949, and article 9(1) of the *Migrant Workers (Supplementary Provisions) Convention* 143 of 1975. South Africa is yet to ratify any of the aforesaid Conventions.

contract workers from the unemployment insurance scheme. To address this problem, as suggested earlier, South Africa should extend the scope of coverage of its unemployment insurance scheme to include non-citizen fixed-term contract workers (e.g. migrant workers).

(b) Income Security Recommendation (1944)

The *Income Security Recommendation* require that unemployment insurance and unemployment assistance schemes be applied as soon as possible to all persons who are employed under a contract of service, and to persons employed under a contract of apprenticeship with money payment.⁷²⁹ It provides further that if exceptions are considered necessary, they should be confined to the narrowest possible limits.⁷³⁰ The *Income Security Recommendation*, on the other hand, envisages coverage that will embrace all workers irrespective of whether they are employed or self-employed.⁷³¹

(c) Social Security (Minimum Standards) Convention (1952)

The *Social Security (Minimum Standards) Convention* treats unemployment as separate branch.⁷³² In terms of Part IV (i.e. the part dealing with unemployment) of this Convention, the persons protected under as unemployment scheme shall comprise of either prescribed classes of employees, constituting not less than 50 per cent of all employees; or all residents whose means during the contingency do not exceed prescribed limits.⁷³³ This Convention does not extend coverage to seamen or fishermen.⁷³⁴ It envisages the provision of unemployment benefits either through an unemployment insurance scheme or a tax financed social assistance scheme. The principle governing unemployment protection coverage under the South African unemployment system is largely that of compulsory insurance of the prescribed classes of workers. The non-insurance plan can, to a certain extent, be noticed in the South African social assistance system – despite this system's indirect link with

⁷²⁹ Paragraph 4(a) of *Unemployment Provision Recommendation*.

⁷³⁰ *Ibid.*

⁷³¹ See Paragraphs 1-4, 14 and 17 of the *Income Security Recommendation*.

⁷³² Part IV of the *Social Security (Minimum Standards) Convention*.

⁷³³ Article 21 of the *Social Security (Minimum Standards) Convention*.

⁷³⁴ Article 77.

unemployment. Ways and means to strengthen the tax-financed scheme in addressing unemployment and its effects should be investigated in South Africa. The unemployment insurance approach (alongside the present weak social assistance system – at least as far unemployment protection is concerned) is inadequate.⁷³⁵

(d) Employment Promotion and Protection against Unemployment Convention (1988)

Persons covered under the *Employment Promotion and Protection against Unemployment Convention* comprise prescribed classes of employees, constituting not less than 85 per cent of all employees, including public employees and apprentices. It should be noted, however, that public employees whose employment up to normal retirement age is guaranteed by national laws or regulations may be excluded from protection. South Africa, as pointed out earlier,⁷³⁶ excludes public servants from the ambit of its unemployment insurance scheme. In light of the fact that the risk of being unemployed in South Africa is as high for civil servants as it is for private sector workers, it is submitted that the exclusion of the South African civil servants is not in accordance with the *Employment Promotion and Protection against Unemployment Convention*. South Africa is yet to ratify this instrument. Nevertheless, it is a member of the ILO. As a result, South Africa should ensure that the scope of coverage of its unemployment protection scheme is in tune with that envisaged by ILO instruments such as this.

(e) Employment Promotion and Protection against Unemployment Recommendation (1988)

The *Employment Promotion and Protection against Unemployment Recommendation* obliges member states to endeavour to extend progressively the application of their legislation concerning unemployment benefits to cover all employees. However, it allows the exclusion of public employees. This exclusion is subject to the condition that the public servants so excluded have employment guaranteed up to the normal retirement age.

⁷³⁵ See ILO *Social Security for the Unemployed* (ILO (1976)) 26.

⁷³⁶ See paragraph 2.2.2.2. in chapter 3.

(f) Some observations

Several conclusions can be drawn from the preceding discussion. Firstly, it is clear that most of the unemployment ILO instruments exclude informal economy workers and certain categories of atypical workers from the envisaged unemployment insurance schemes.⁷³⁷ The ILO instruments, particularly the so-called up-to-date Conventions, dealing with unemployment protection need to be broadened to include the abovementioned excluded categories and groups of workers. This is important for developing countries where millions of vulnerable persons eke a living in the informal economy or are engaged as non-standard workers. Nonetheless, it should be remembered that the standards contained in the ILO instruments dealing with unemployment do not preclude member states from including any of the excluded groups under their schemes. Part IV (part concerning unemployment benefit) of the *Social Security (Minimum Standards) Convention*, for example, sets only minimum standards and member states can choose between alternative standards. This is in line with the flexibility principle embodied in some of the international unemployment protection instruments (e.g. the *Social Security (Minimum Standards) Convention*).⁷³⁸ The danger of this approach is that member states (particularly those from the developing world) whose unemployment protection schemes are not at the top of the policy agenda might limit their efforts to extend coverage to the minimum level of coverage required by international instruments.

⁷³⁷ However, see Pennings F and Schulte B “Some current points of discussion concerning social security conventions” in Pennings F (ed) *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer (2006)) 43 at 47-48.

⁷³⁸ The principle of flexibility embrace the following aspects: “The first is the realistic acceptance of the fact that unemployment and underemployment are still endemic in vast regions of the [developing] world, that large sectors of the economy are still of an informal nature and indeed sometimes remain outside the monetary economy, and that there may be a severe shortage of adequate...infrastructure. Accordingly, the income maintenance...advocated by [the *Income Security Recommendation*]...should be reduced and adapted to a *de facto* situation which precluded the granting of such guarantees to large sectors of the population. The second aspect – which is clearly explicit in [the *Social Security (Minimum Standards) Convention*] – was nevertheless to encourage a dynamic process of gradual application of social security measures by fixing a minimum level to serve as an objective and a bench-mark for young countries aspiring to ‘social security’” (ILO *Employment Promotion and Social Security* (ILO (1986)) 9). See Pennings F and Schulte B “International social security standards: An overview” in Pennings F (ed) *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer (2006)) 1 at 7-8 and 13 and Kulke U “Overview of up-to-date ILO social security conventions” in Pennings F (ed) *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer (2006)) 27 at 27-29.

Secondly, some of the up-to-date instruments (e.g. the *Employment Promotion and Protection against Unemployment Convention*) require the member states to include public servants in their unemployment insurance schemes. This is to be welcomed for “the whole essence of social security, and indeed social justice, is that each risk be pooled by the whole community, without escape for those who can expect to avoid the risk or to finance themselves during it.”⁷³⁹ Another point to be observed is that the hypothesis that employment security is high among public servants is not entirely correct. In South Africa, for example, the risk of being unemployed is as high as it is in the private sector. To this end, it is recommended that South Africa should widen the scope of coverage of its unemployment insurance scheme to include civil servants.

Thirdly, most of the abovementioned instruments (e.g. the *Employment Promotion and Protection against Unemployment Convention* and the *Income Security Recommendation*) envisage the inclusion of apprentices⁷⁴⁰ and the self-employed under the scope of coverage of the unemployment insurance scheme. South Africa could learn from these instruments and cover these categories of workers under its unemployment insurance scheme. Where necessary this could be done progressively.⁷⁴¹ Section 27(2) of the South African Constitution and the *Employment Promotion and Protection against Unemployment Recommendation* do allow the progressive extension of coverage.

Furthermore, there are (up-to-date) ILO instruments which require equality of treatment as regards unemployment benefit schemes.⁷⁴² South Africa is yet to ratify the up-to-date instruments requiring same. Nevertheless, it is bound by a similar provision contained in the *Unemployment Convention*. In light of the fact that South Africa ratified this instrument it

⁷³⁹ ILO *Social Security for the Unemployed* (ILO (1976)) 16-17.

⁷⁴⁰ The exclusion of apprentices is unfortunate because this category of employees fell under the scope of coverage of the previous UIA.

⁷⁴¹ It should be recalled that s 27(2) of the Constitution (South Africa) does permit the state to strive at the progressive realisation of everyone's right of access to social security.

⁷⁴² For example, article 68 of the *Social Security (Minimum Standards) Convention* 102 of 1952, article 6 of the *Employment Promotion and Protection against Unemployment Convention* 168 of 1988, the *Equality of Treatment (Social Security) Convention* 118 of 1962, article 6(1) of the *Migration for Employment Convention (Revised)* 97 of 1949, and article 9(1) of the *Migrant Workers (Supplementary Provisions) Convention* 143 of 1975.

follows that its exclusion of non citizen fixed-term workers is in breach of its international obligations flowing from this instrument. Immediate action, through the inclusion of this category of workers in the unemployment insurance scheme, is needed to remedy this situation.⁷⁴³ In addition, South Africa could establish reciprocal agreements with other ILO member states (particularly those which have ratified the *Unemployment Convention*). These reciprocal agreements could be kept simple by requiring equality of treatment of nationals of the contracting countries in application of unemployment insurance.⁷⁴⁴ Alternatively, they may “provide for combining insurance periods served in different countries, or for payment of unemployment benefits by one country as agent for the other.”⁷⁴⁵

Lastly, South Africa has a dismal ratification record of ILO instruments in the unemployment protection sphere – particularly the up-to-date ones. As part of the endeavours to redesign its unemployment protection system, South Africa needs to align its system with the ILO (up-to-date) international unemployment standards in view of full or partial ratification. As a matter of fact, the current unemployment insurance scheme does – to a certain extent – meet the ILO international unemployment standards. For example, the South African unemployment insurance system does provide an unemployment benefit claimant with a right to challenge the refusal, withdrawal, suspension or reduction of benefit as required by article 27 of the *Employment Promotion and Protection against Unemployment Convention* and article 70(1) of the *Social Security (Minimum Standards) Convention*.

⁷⁴³ The issue is that: “Nothing inherent in compulsory unemployment insurance requires that employees who are not citizens of the country they work in should be excluded from coverage. Contributions should be levied in respect of their employment and, if they become unemployed, they should receive benefits under the same conditions as nationals of the country. On the other hand it is difficult to verify the existence or continuance of unemployment if an unemployed worker – whether national or [foreign] – leaves the country in which his insurance rights have been built up. Unless, therefore, adequate reciprocal arrangements can be worked out with the administrative authorities of other countries, benefits cannot usually be paid to unemployed [foreigners] who leave the country in which they were previously employed” (ILO *Unemployment Insurance Schemes* (ILO 1955)) 93-94).

⁷⁴⁴ ILO *Unemployment Insurance Schemes* (ILO 1955)) 94.

⁷⁴⁵ *Ibid* at 95.

2.2.2.3. Types of benefits

The ILO (international) standards making provision for unemployment protection envisages two types of benefits, namely social insurance benefits (contributions financed) as well as social assistance benefits (tax financed). These benefits are, as apparent from international standards, granted subject to qualifying conditions.

(a) Income Security Recommendation (1944)

This Recommendation, as its title suggests, is aimed at income security. It reaffirms the importance of income security as an essential element of social security. To this end, it sets out a variety of proposals which are aimed at the realisation of income security by member states. At the forefront of these recommendations is the guiding principle that: “Income security schemes should relieve want and prevent destitution by restoring, up to a reasonable level, income which is lost by reason of inability to work (including old age) or to obtain remunerative work or by reason of the death of a breadwinner.”⁷⁴⁶ These income security schemes, as is the case with social security schemes generally, may be divided into social insurance and social assistance schemes. The Recommendation places the organisation of income security through compulsory social insurance above social assistance. Social assistance should kick in only in the case of social needs not covered by compulsory social insurance. In such a situation, certain categories of persons (which include dependent children and needy persons with disabilities, aged persons and widows) should be entitled to allowances. The rationale behind this approach, it is submitted, is to ensure that only those individuals and certain groups of persons who could not make provision for their income security benefit from a public scheme. The South African unemployment protection scheme does not provide social assistance benefits (alongside unemployment insurance benefits) as envisaged by this Recommendation. Although a Recommendation is meant to serve only as a guide to national policies, it is recommended that South Africa should endeavour to introduce social assistance benefits as envisaged by this instrument.

⁷⁴⁶ Paragraph 1 of the *Income Security Recommendation*.

The *Income Security Recommendation* is evidently concerned with the restoration (to a reasonable level) of lost income due to the inability to work. This clearly indicates that the benefits payable should be intimately linked to certain contingencies which have the effect of inducing the inability to work which accordingly leads to the loss of income. These contingencies include, among others, the following: unemployment, sickness, maternity and death of a breadwinner. The benefits payable are tailored in accordance with the income insecurity inducing risks: the ‘unemployment benefit’ should be paid in the case of loss of earnings due to the unemployment of an insured person who is ordinarily employed, capable of regular employment in some occupation, and seeking suitable employment, or due to part-time unemployment;⁷⁴⁷ the contingency for which ‘sickness benefit’ should be paid is loss of earnings due to abstention from work necessitated on medical grounds by an acute condition, due to disease or injury, requiring medical treatment or supervision;⁷⁴⁸ the contingency for which ‘maternity benefit’ should be paid is loss of earnings due to abstention from work during prescribed periods before and after childbirth;⁷⁴⁹ and the contingency for which ‘survivors’ benefits’ should be paid is the loss of support presumably suffered by the dependants as the result of the death of the head of the family.⁷⁵⁰ Provision for ‘survivors’ benefits’ is made in South Africa through an unemployment insurance system.⁷⁵¹

(b) Social Security (Minimum Standards) Convention (1952)

The *Social Security (Minimum Standards) Convention* encourages member states to secure to the persons protected the provision of, among many other benefits, sickness benefit,⁷⁵² unemployment benefit,⁷⁵³ maternity benefit,⁷⁵⁴ and survivors’ benefit.⁷⁵⁵ This Convention

⁷⁴⁷ Paragraph 14. Also see paragraph 14(1) of an Annex of the *Income Security Recommendation*.

⁷⁴⁸ Paragraph 9. Also see paragraph 9 of an Annex of the *Income Security Recommendation*.

⁷⁴⁹ Paragraph 10. Read paragraph 10 in conjunction with paragraph 10 of an Annex of the *Income Security Recommendation*.

⁷⁵⁰ Paragraph 13. Also see paragraph 13 of an Annex of the *Income Security Recommendation*.

⁷⁵¹ See paragraph 2.2. in chapter 3.

⁷⁵² Part III of the *Social Security (Minimum Standards) Convention*. Part III of the *Medical Care and Sickness Benefits Convention* 130 of 1969 makes provision for the payment of sickness benefits in the case of incapacity for work resulting from sickness and involving suspension of earnings. South Africa is yet to ratify this up-to-date Convention.

⁷⁵³ Part IV.

⁷⁵⁴ Part VIII. Article 6 of the *Maternity Protection Convention* 183 of 2000 makes provision for the payment of cash benefits to women who are absent from work due to maternity leave. South Africa has not ratified this up-

requires that unemployment benefits be paid subject to the condition that a contributor is capable of and available for work. The general consequence of the ‘ability to work’ condition is that employees who are unemployed due to, for example, sickness at the time of filing a claim would not be entitled to unemployment benefits.⁷⁵⁶ The implication of this is that incapacity to work due to sickness should be covered by a separate scheme (i.e. a scheme other than the unemployment insurance scheme). As discussed earlier this is not the case in the South African unemployment protection system.

(c) Employment Promotion and Protection against Unemployment Recommendation (1988)

In conjunction with the unemployment benefits, which should be provided in the form of periodical payments fairly compensating for the loss of earnings due to unemployment,⁷⁵⁷ this Recommendation encourages member states to make an effort to provide allowances. The goal of these allowances is to serve as occupational or geographical mobility incentives.⁷⁵⁸ South Africa does not make provision for the aforesaid allowances. In addition, it recommends that member states “whose laws or regulations require employers to make severance payments to workers who have lost their jobs should envisage making provision for the employers to bear this responsibility in common through the creation of funds financed by employers’ contributions, so as to ensure the receipt of these payments by the workers concerned.”⁷⁵⁹ The South African labour law regime does provide for the payment of severance benefits. However, it does not make provision for the establishment of the abovementioned funds.

to-date instrument. See Dupper OC “Maternity” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 399.

⁷⁵⁵ Part X. South Africa has not ratified the *Invalidity Old-Age and Survivors’ Benefits Convention* 128 of 1967.

⁷⁵⁶ ILO *Unemployment Insurance Scheme* (ILO (1955)) 99.

⁷⁵⁷ Paragraph 12 of the *Employment Promotion and Protection against Unemployment Recommendation*.

⁷⁵⁸ Paragraphs 4 and 5.

⁷⁵⁹ Paragraph 30.

(d) Some observations

It is clear from the preceding discussion that there is a variety of ILO Conventions which impose a duty on the member states which ratify same to provide unemployment benefits and unemployment related benefits such as maternity, sickness, and survivors' benefits. These instruments also list qualifying conditions to be complied with before the claimant can draw (unemployment or unemployment related) benefits. Another point to be noted is that some of these instruments envisage a situation whereby the ratifying member states would provide contribution financed benefits alongside the tax financed benefits. The tax financed scheme is supposed to be complementary to the unemployment insurance scheme. The overall goal, so it seems, is to ensure that individuals who have exhausted their benefits or those who have not yet acquired the right to benefit are not left destitute. The South African unemployment protection system does provide for unemployment, maternity, sickness and survivors' benefits although that country is yet to ratify any of the up-to date conventions dealing with unemployment protection. In addition, it requires a claimant to be capable of and available for work. Nevertheless, there are several requirements in the South African unemployment protection system which conflict with those contained in the ILO Conventions dealing with the provision of benefits. For instance, the unemployment insurance scheme provides benefits in the case of inability to work due to illness. This, as argued earlier, is contrary to the general aim of this condition which is to render such persons ineligible for unemployment insurance benefits. Such persons should be covered under a social security scheme dealing with the risks concerned (i.e. sickness). This calls for the separation of unemployment benefits from sickness and family related benefits (e.g. maternity benefits) from the unemployment insurance scheme. Secondly, the South African unemployment protection scheme does not provide for a complementary social assistance benefit as envisaged by, for example, the *Income Security Recommendation* (1944). It is doubtful if the social assistance grants available at the moment would fulfil the role of the complementary social assistance envisaged by the ILO instruments dealing with unemployment. This is largely due to their limited scope of coverage. Therefore, it is suggested once more that South Africa should investigate the possibilities of introducing or expanding one or a combination of tax financed alternatives. This could involve the introduction of universal benefits, the gradual extension

of social assistance benefits and/or tax financed services or combining universal benefits with tax financed benefits or services.

2.2.3. Social security coordination

2.2.3.1. Introduction

The ILO is hailed as an organisation that has established the so-called ‘global coordination scheme’.⁷⁶⁰ This is, to a large extent, correct. Firstly, as pointed earlier, the ILO is a universal organisation which counts almost every country of the world as its member. Secondly, its instruments – which include a limited number of coordination instruments – are universal. The ILO instruments which are specifically dedicated to the coordination of social security schemes of those countries that have ratified them include: the *Equality of Treatment (Social Security) Convention* (118 of 1962) and the *Maintenance of Social Security Rights Convention* (157 of 1982). Both Conventions are among the up-to-date instruments in the social security field and South Africa is yet to ratify them. Alongside these instruments there are ILO treaties which make provision for social security coordination rules. For example, Part XII of the *Social Security (Minimum Standards) Convention* makes provision for the equality of treatment of non-national residents. The *Unemployment Convention* (2 of 1919), on the other hand, requires ratifying member states to “make arrangements whereby workers belonging to one Member and working in the territory of another shall be admitted to the same rates of benefit of such insurance as those which obtain for the workers belonging to the latter.”⁷⁶¹ These arrangements could, and often do, include bi- and multinational coordination treaties between countries. The social security coordination rules and principles contained in these instruments are primarily aimed at: ensuring equality of treatment between nationals and non-nationals, preserving acquired rights and rights in course of acquisition, transferring eligibility for benefits between national programmes, protecting the position of dependants left behind and providing rights to receive benefits in other countries.⁷⁶² According, the following basic principles of social security coordination can be found the

⁷⁶⁰ Pennings F *Introduction to European Social Security Law* (4th ed) (Intersentia (2003)) 13.

⁷⁶¹ Article 3 of the *Unemployment Convention*.

⁷⁶² ILO *Into the Twenty-First Century: The Development of Social Security* (ILO (1984)) 33.

ILO instruments: equality of treatment, maintenance of acquired rights and the provision of benefits abroad, maintenance of rights in the course of acquisition, and the determination of the applicable legislation.

2.2.3.2. Equality of treatment

The gist of this principle is that foreign workers should be accorded the same treatment as regards coverage and entitlement to social security benefits similar to those of the nationals of the host country. The principle of equality of treatment is dealt with comprehensively in the *Equality of Treatment (Social Security) Convention*.⁷⁶³ This Convention covers all nine branches of social security (i.e. medical care, sickness benefit, maternity benefit, invalidity benefit, old-age benefit, survivors' benefit, employment injury benefit, unemployment benefit and family benefit).⁷⁶⁴ The equality of treatment granted by this Convention applies to both (social security) coverage and the right to benefits in respect of those branches of social security that the ratifying member state has accepted the obligations of the Convention.⁷⁶⁵ Nonetheless, a member state which has ratified this Convention may not be required to apply the equality of treatment to the nationals of another member state which does not grant equality of treatment in respect of the nationals of the first member state. Furthermore, the equality of treatment principle does not cover the participation of non-nationals in social security administration or in the operation of consultative bodies concerned with social security.⁷⁶⁶ Another point to be noted is that the equality of treatment principle applies to refugees as well as stateless persons without any condition of reciprocity.⁷⁶⁷

⁷⁶³ As pointed out earlier this principle may also be found in other ILO instruments (e.g. Part XII of the *Social Security (Minimum Standards) Convention*).

⁷⁶⁴ Article 2(1) of the *Equality of Treatment (Social Security) Convention*.

⁷⁶⁵ Article 3(1) of the *Equality of Treatment (Social Security) Convention*.

⁷⁶⁶ *ILO Equality of Treatment (Social Security): General Survey by the Committee of Experts on the Application of Conventions and Recommendations* (ILO (1977)) 19-20.

⁷⁶⁷ Article 10(1) of the *Equality of Treatment (Social Security) Convention*.

2.2.3.3. Maintenance of acquired rights and the provision of benefits abroad

The maintenance of acquired rights principle⁷⁶⁸ “permits migrant workers to receive benefits which are due to them from a State, even when they cease to be resident on its territory.”⁷⁶⁹ As a result, it essentially entails the payment of benefits abroad. It also ensures that migrant workers enjoy *de facto* equality of treatment and not just *de jure* equality.⁷⁷⁰ Provisions concerning the maintenance of acquired rights and the provision of benefits abroad can be found in the *Equality of Treatment (Social Security) Convention* as well as the *Maintenance of Social Security Rights Convention*. The *Equality of Treatment (Social Security) Convention* requires ratifying states to endeavour to participate in schemes for the maintenance of the acquired rights.⁷⁷¹ The system of maintenance of rights must, in accordance with article 7(1) of the *Equality of Treatment (Social Security) Convention*, cover all branches of social security of which the member states concerned have accepted the obligations of the Convention. Member states which have accepted the obligations of this Convention (in respect of the branches of social security concerned) are required to guarantee the provision of benefits abroad. This duty applies to both its own nationals and to those of any other member state which has accepted the obligations of the Convention for the same branch(es).⁷⁷² A similar provision can also be found in the *Maintenance of Social Security Rights Convention*.⁷⁷³ As in the case of the equality of treatment principle, the maintenance of acquired rights as provided in the *Equality of Treatment (Social Security) Convention* as well as the *Maintenance of Social Security Rights Convention*. The *Equality of Treatment (Social Security) Convention*, applies to refugees and stateless persons without any condition of reciprocity.⁷⁷⁴

⁷⁶⁸ See paragraphs 3.2.1.1. and 4.2.2.4. in chapter 4.

⁷⁶⁹ Humblet M and Silva R *Standards for the XXIst Century: Social Security* (ILO (2002)) 42-43.

⁷⁷⁰ Humblet M and Silva R *Standards for the XXIst Century: Social Security* (ILO (2002)) 43 and ILO *Social Security for Migrant Workers* (ILO (1977)) 64.

⁷⁷¹ Article 7(1) of the *Equality of Treatment (Social Security) Convention*.

⁷⁷² Article 5(1) of the *Equality of Treatment (Social Security) Convention*.

⁷⁷³ See article 9(1) of the *Maintenance of Social Security Rights Convention*.

⁷⁷⁴ See article 10(1) of the *Equality of Treatment (Social Security) Convention* and article 9(1) of the *Maintenance of Social Security Rights Convention*.

2.2.3.4. Maintenance of rights in the course of acquisition

The right to social security benefits are, in some instances, acquired over a period of time. A prospective beneficiary is at times required to complete a qualifying period before he or she could draw any benefits. As a result, this could put migrant workers in a disadvantageous position for the reason that they might be required to complete a new qualifying period each time they change their State of residence. The maintenance of rights in the course of acquisition addresses this problem in that it makes it possible to add together periods of coverage of migrant workers under the social security legislation of the various countries in which they have lived. This principle is provided for in both the *Equality of Treatment (Social Security) Convention* as well as the *Maintenance of Social Security Rights Convention*. These Conventions require the member states that have ratified them to endeavour to participate in schemes for the maintenance of rights in the course of acquisition.⁷⁷⁵

2.2.3.5. Determination of the applicable legislation

The primary aim of the rules relating to the determination of the applicable legislation is to prevent “conflicts of laws and the undesirable consequences that might ensue for those concerned either through lack of protection, or as a result of undue plurality of contributions or other liabilities or of benefits.”⁷⁷⁶ Provisions dealing with the determination of the applicable legislation can be found in Part II of the *Maintenance of Social Security Rights Convention*. According to article 5(1) of the *Maintenance of Social Security Rights Convention*, “the legislation applicable in respect of the persons covered by this Convention shall be determined by mutual agreement between the Members concerned.” The rules governing the determination of applicable legislation are set as follows: employees who are normally employed in the territory of a member shall be subject to the legislation of that member, self-employed persons who normally engage in their occupation in the territory of a

⁷⁷⁵ Article 7(1) of the *Equality of Treatment (Social Security) Convention* and article 10(1) of the *Maintenance of Social Security Rights Convention*.

⁷⁷⁶ Article 5(1) of the *Maintenance of Social Security Rights Convention*.

member shall be subject to the legislation of that member, employees and self-employed persons sailing on board a ship flying the flag of a member shall be subject to the legislation of that member, and persons who are not part of the economically active population shall be subject to the legislation of the member in whose territory they are resident.⁷⁷⁷ Nevertheless, member states concerned have the discretion to determine by mutual agreement other exceptions to the aforementioned rules in the interest of the persons concerned.⁷⁷⁸

2.2.3.6. Some observations

The foregoing social security coordination principles, contained in the ILO instruments, are crucial in promoting access to social security for migrant workers as well as their families. Yet, the ratification of these important instruments remains low.⁷⁷⁹ It is clear that the ILO coordination instruments have laid the basis for social security coordination at an international level.⁷⁸⁰ They have a wider impact. Nonetheless, it is disappointing to note that the “[coordination] under the ILO progresses with difficulty and, as a result, it is still in a rudimentary stage.”⁷⁸¹ The reason advanced for this situation is that: “worldwide conventions with extensive coordination rules run the risk of being ratified by only a small number of countries. Hence it is natural that the Convention holding the largest number of ratifications (Convention 118) is very specific, prohibiting discrimination on the ground of nationality and requiring export of benefits. Conventions that require high standards are, of course, more problematic for many States.”⁷⁸²

⁷⁷⁷ *Ibid.*

⁷⁷⁸ Article 5(3) of the *Maintenance of Social Security Rights Convention*.

⁷⁷⁹ For instance, the *Equality of Treatment (Social Security) Convention*, has (as of 19 April 2006) been ratified by 38 member states (i.e. Bangladesh, Barbados, Bolivia, Brazil, Cape Verde, Central African Republic, Democratic Republic of the Congo, Denmark, Ecuador, Egypt, Finland, France, Germany, Guatemala, Guinea, India, Iraq, Ireland, Israel, Italy, Jordan, Kenya, Libyan Arab Jamahiriya, Madagascar, Mauritania, Mexico, Netherlands, Norway, Pakistan, Philippines, Rwanda, Suriname, Sweden, Syrian Arab Republic, Tunisia, Turkey, Uruguay and Bolivarian Republic of Venezuela). The *Maintenance of Social Security Rights Convention*, on the other hand, has (as of 19 April 2006) been ratified by only three member states (namely Sweden, Spain and Philippines). South Africa is conspicuous by its absence on the ratification list of these up-to-date instruments.

⁷⁸⁰ See, for example, European instruments (in paragraphs 3.2. and 4.2.2. in chapter 4), *Cibbean Community Social Security Agreements* (– accessed at <http://www.caricom.org>) and *Draft Code on Social Security in the SADC* (2004).

⁷⁸¹ Pennings F *Introduction to European Social Security Law* (4th ed) (Intersentia (2003)) 13.

⁷⁸² *Ibid.*

Although South Africa is yet to ratify the *Equality of Treatment (Social Security) Convention*, it should be recalled that its Constitution provides every person present in South Africa, subject to the limitation and the interpretation clause, with a right to equal treatment (s 9 of the Constitution) as well as the right of access to social security (s 27(1)(c) of the Constitution).⁷⁸³ It remains to be seen how the Constitutional Court will adjudicate the current exclusion of non-citizen migrant workers from the ambit of the South African unemployment insurance scheme.

2.2.4. Employment protection

2.2.4.1. Introduction

The right to work is central to employment protection.⁷⁸⁴ This right can be found, either expressly or implicitly, in many international instruments. At an ILO level, the right to work can be inferred from the Constitution of the ILO and the *Universal Declaration of Human Rights*.⁷⁸⁵ Despite the controversy that surrounds the true connotation to be attached to the right to work (e.g. whether the unemployed can demand work from the government or not), employment remains a fundamental tool to ward-off social insecurities and therefore merits protection. To this end, several far-reaching provisions regarding employment protection have been laid out in international instruments. The *Termination of Employment Convention* and the *Termination of Employment Recommendation* set the basic principles regulating the termination of employment⁷⁸⁶ at the initiative of the employer. Both instruments apply to “all

⁷⁸³ The Constitutional Court of South Africa has made it clear that citizens may not be preferred above permanent residents in far as access to permanent employment in the public sector (*Larbi-Odam v Member of the Executive Council for Education (North West Province)* 1997 12 BCLR 1655 (CC)) and access to social assistance (*Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC)) are concerned.

⁷⁸⁴ See paragraph 1.2.1. in chapter 3.

⁷⁸⁵ Other international instruments include the *International Covenant on Economic, Social and Cultural Rights* (1966), the *European Social Charter* and the *African Charter on Human and People's Rights* (1981).

⁷⁸⁶ In accordance with Article 3 of the *Termination of Employment Convention* 158 of 1982 and paragraph 4 of the *Termination of Employment Recommendation* the terms ‘termination’ and ‘termination of employment’ refer to the “termination of employment at the initiative of the employer”. It should be borne in mind that: “Under this definition, the instruments cover termination of the employment relationship – and not other business relations – at the initiative of the employer – and not at the initiative of the worker or as a result of a genuine and freely negotiated agreement between the parties. Furthermore, while the term ‘termination’ means termination of the employment relationship and not other interruptions, as for example suspension of the

branches of economic activity and to all employed persons.”⁷⁸⁷ Member states have, nonetheless, the discretion to exclude certain categories of workers from the scope of coverage of these two instruments.⁷⁸⁸ These categories of workers are: workers engaged under a contract of employment for a specified period of time or a specified task; workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration; and workers engaged on a casual basis for a short period.⁷⁸⁹

The *Termination of Employment Convention* (1982) recognises three grounds upon which the employment of a worker may be validly terminated. These grounds are: capacity of the worker; conduct of the worker and operational requirements of the undertaking, establishment or service.⁷⁹⁰ Despite the fact that an employer may terminate employment on the basis of reasons connected to a worker’s conduct or capacity, the *Termination of Employment Convention* and the *Termination of Employment Recommendation* lay down procedures to be followed prior to or at the time of termination of employment. These procedures are clearly calculated at the protection of employment. It therefore follows that the termination of employment should not only comply with the substantive requirements (i.e. grounds for termination of employment) but also with procedural requirements (i.e. the procedure followed in effecting termination of employment). All of this, it can be opined, is in the interest of fairness. The substantive requirement implies that employment is only terminated for a fair reason whereas the procedural requirement is aimed at making sure that the procedure adopted is fair.

employment contract, it should be noted that such suspension, for example, due to illness or maternity, is directly related to termination of the employment relationship in so far as in some countries the worker is protected against termination during the period of suspension of the contract.” ILOLEX “1995, Protection against unjustified dismissal: Definition and methods of implementation” – accessed at <http://www.ilo.org>.

⁷⁸⁷ Article 2(1) of the *Termination of Employment Convention* and paragraph 2(1) of the *Termination of Employment Recommendation*. It therefore follows that the scope of coverage of these two instruments incorporates all individuals (inclusive of civil servants, foreigners and/or non-nationals) in an employment relationship. Notwithstanding the foregoing, certain individuals may still be excluded despite being involved in an employment relationship. See, for further reading, ILOLEX “1995, Protection against unjustified dismissal: Scope of the instruments as regards individuals” – accessed at <http://www.ilo.org>.

⁷⁸⁸ Article 2(2) of the *Termination of Employment Convention* and paragraph 2(2) of the *Termination of Employment Recommendation*.

⁷⁸⁹ *Ibid.* See, for further reading, ILOLEX “1995, Protection against unjustified dismissal: Definition and methods of implementation” – accessed at <http://www.ilo.org>.

⁷⁹⁰ Article 4 of the *Termination of Employment Convention*.

Note should be taken of the fact that, alongside the aforesaid grounds upon which the employment of a worker may be validly terminated, the *Termination of Employment Convention* provides a list of invalid reasons for termination of employment. These reasons, as expounded in article 5 of the *Termination of Employment Convention*, are as follows: union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours; seeking office as, or acting or having acted in the capacity of, a workers' representative; the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities; race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and absence from work during maternity leave.⁷⁹¹ In addition, temporary absence from work on account of illness or injury does not amount to a valid reason for termination of employment.⁷⁹² The *Termination of Employment Recommendation* (1982) provides additional grounds which should not constitute a valid reason for termination of employment: "age, subject to national law and practice regarding retirement"⁷⁹³ as well as "absence for work due to compulsory military service or other civic obligations, in accordance with national law and practice."⁷⁹⁴

2.2.4.2. Grounds for dismissal

(a) Capacity of the worker

A worker's incapacity to satisfactorily execute duties accruing from an employment relationship may result in the dismissal of the worker concerned. The lack of capacity on the part of a worker does not necessarily merit a termination of such worker's contract of

⁷⁹¹ Some of these reasons as embodied in Article 5, to a certain degree mirror the protection afforded by a sizeable number of ILO instruments. These instruments include, among others, the following: the *Right to Organize and Collective Bargaining Convention*; the *Discrimination (Employment and Occupation) Convention and Recommendation*; the *Workers' Representatives Convention and Recommendation*; the *Workers with Family Responsibilities Convention and Recommendation*; the *Maternity Protection Convention*, the *Maternity Protection Convention (Revised)*, and the *Maternity Protection Recommendation*.

⁷⁹² Article 6(1) of the *Termination of Employment Convention* and paragraph 6(1) of the *Termination of Employment Recommendation*.

⁷⁹³ Paragraph 5(a) of the *Termination of Employment Recommendation*.

⁷⁹⁴ Paragraph 5(b).

employment. The employer should, in certain instances, make an effort to (progressively) remedy the situation. This could include steps such as warning the worker concerned about the possible termination of employment in the event that his/her work does not improve as well as providing the worker with sufficient time to demonstrate his/her ability to satisfactorily discharge his duties.⁷⁹⁵ The *Termination of Employment Recommendation* requires that: “the employment of a worker should not be terminated for unsatisfactory performance, unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed.”⁷⁹⁶

(b) Conduct of the worker

An improper behaviour (which is often referred to as misconduct) by a worker may, if considered serious, attract a disciplinary action against and the dismissal of the worker concerned. Two types of improper behaviour are identifiable. The first type of improper behaviour “involves inadequate performance of duties the worker was contracted to carry out”.⁷⁹⁷ This may include the following forms of misconduct: “neglect of duty, violation of work rules (particular mention is sometimes made of rules related to safety and health), disobedience of legitimate orders and absence or lateness without good cause.”⁷⁹⁸ The second type of misconduct, on the other hand, “encompasses various types of improper behaviour”⁷⁹⁹ such as the following: “disorderly conduct, violence, assault, using insulting language, disrupting the peace and order of the workplace, turning up for work in a state of intoxication or under the influence of narcotic drugs, or the consumption of alcohol or drugs at the workplace, various acts displaying a lack of honesty and trustworthiness, such as fraud, deceit, breach of trust, theft and various disloyal activities (such as divulging trade secrets or undertaking activities in competition with the employer) or causing material damage to the

⁷⁹⁵ *Ibid.*

⁷⁹⁶ Paragraph 8 of the *Termination of Employment Recommendation*.

⁷⁹⁷ ILOLEX “1995, Protection against unjustified dismissal: Obligations for termination of employment to be judged by a valid reason” – accessed at <http://www.ilo.org>.

⁷⁹⁸ *Ibid.*

⁷⁹⁹ *Ibid.*

property of the undertaking.”⁸⁰⁰ It should be noted that some forms of improper behaviour, for example, late coming without a good reason, need to be persistent in order to warrant a dismissal.⁸⁰¹ Another point which should be noted is that certain forms of behaviour outside the workplace, for example behaviour that has resulted in the imprisonment of an employee, may result in the termination of an employment relationship.⁸⁰²

(c) Operational requirements of an undertaking

Unlike the other two grounds for the termination of employment, this ground has nothing to do with the capacity or conduct of a worker. Thus the termination of employment due to this ground is often dubbed no-fault dismissal. The termination of employment of a worker is necessitated by, among others, economic, technological or structural reasons. What is meant by economic, technological or structural reasons varies from one country to another and “commonly takes into account situations such as plant closures, suspensions, production difficulties or cut-backs, phasing-out of industrial processes, changes in procedures or jobs, readjustments, restructuring, among others, which are unrelated to the employees themselves.”⁸⁰³ It should be kept in mind that there are conditions and procedures for employers, which are discussed below, to comply with before they can terminate employment on the basis of the operational requirements of an undertaking.

2.2.4.3. Procedure prior to or at the time of termination

In accordance with the *Termination of Employment Convention* employers have an obligation to comply with rules of natural justice before terminating the employment of a worker on the

⁸⁰⁰ *Ibid.*

⁸⁰¹ *Ibid.* In accordance with paragraph 7 of the *Termination of Employment Recommendation*: “The employment of a worker should not be terminated for misconduct of a kind that under national law or practice would justify termination only if repeated on one or more occasions, unless the employer has given the worker appropriate written warning.” Furthermore, failure by the employer to terminate the employment of a worker for misconduct within a reasonable time will result in the employer being deemed to have waived his right to terminate the employment of the worker concerned (paragraph 10 of the *Termination of Employment Recommendation*).

⁸⁰² ILOLEX “1995, Protection against unjustified dismissal: Obligations for termination of employment to be judged by a valid reason” – accessed at <http://www.ilo.org>.

⁸⁰³ Evans-Klock C *et al* “Worker retrenchment: Preventative and remedial measures” (1999) 138 *International Labour Review* 47 at 48, fn 2.

basis on conduct or performance. Firstly, an employer must provide the worker concerned with an opportunity to defend himself/herself against the allegations levelled against him.⁸⁰⁴ For the purpose of defending himself/herself, a worker is entitled to enlist the help of another person.⁸⁰⁵ Secondly, the employer has duty to notify a worker in writing about the decision to terminate his/her employment.⁸⁰⁶ A worker who has been notified about the termination of his employment has a right to receive, on request, a written statement from his/her employer of the reason(s) for such termination of employment.⁸⁰⁷ The aforesaid right does not apply in a situation of collective termination resulting from operational requirements of an undertaking.⁸⁰⁸ This provision is subject to the condition that the procedure to be followed in a situation of collective dismissals is complied with.⁸⁰⁹ In addition, article 8 of the *Termination of Employment Convention* empowers workers who are of a view that their employment has been unjustifiably ended to appeal against such a decision to an impartial body.⁸¹⁰ Such an impartial body, as per the Convention, includes a court, labour tribunal, arbitration committee or arbitrator.⁸¹¹ The *Termination of Employment Convention* foresees a variety of sanctions against an employer in the event of a finding, by the said bodies, that a termination of employment complained about is unjustified. Accordingly, it points out that in the event that an impartial body which has been set up to adjudicate in cases of unjustified terminations is “not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.”⁸¹² A delay for an unreasonable period by a worker in exercising the right to appeal may result in an assumption that such a worker has waived his

⁸⁰⁴ Article 7 of the *Termination of Employment Convention*. This duty may, in line with Article 7, be dispensed with if it cannot be reasonably expected of the employer to provide such an opportunity.

⁸⁰⁵ Paragraph 9 of the *Termination of Employment Recommendation*. This Recommendation does not state the categories of persons that can assist a worker in defending himself. It is therefore opined that such a person could be a fellow worker or even a trade union official (like it is in South Africa).

⁸⁰⁶ Paragraph 11 of the *Termination of Employment Recommendation*.

⁸⁰⁷ Paragraph 13(1).

⁸⁰⁸ Paragraph 13(2).

⁸⁰⁹ These procedures relate to the consultation of workers' representatives and the notification to the competent authority as expounded in Article 13 and Article 14 of the *Termination of Employment Convention*. See paragraph 2.2.4.6. in chapter 4.

⁸¹⁰ Article 8(1) of the *Termination of Employment Convention*.

⁸¹¹ *Ibid.*

⁸¹² Article 10.

right to appeal against the termination.⁸¹³ To counter a situation whereby workers fail to exercise their right to appeal on account of ignorance, the *Termination of Employment Recommendation* encourages public authorities, workers' representatives and workers' organisations to endeavour towards ensuring that workers are fully informed about their right to appeal.⁸¹⁴

2.2.4.4. Notice of termination

An employer has a duty to provide a worker whose employment is to be terminated with reasonable notice or compensation in lieu thereof.⁸¹⁵ This duty may, however, be disregarded in a situation whereby a worker concerned is guilty of serious misconduct. That is to say, in the words of the *Termination of Employment Convention*, "misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period."⁸¹⁶ The rationale behind the notice period, it appears, is to provide a worker whose employment is to be terminated with an opportunity to start searching for other job opportunities. This is fortified by a provision in the *Termination of Employment Recommendation* that during the period of notice, "the worker should, for the purpose of seeking other employment, be entitled to a reasonable amount of time off without loss of pay, taken at times that are convenient to both parties."⁸¹⁷

2.2.4.5. Severance payment

The *Termination of Employment Convention* and the *Termination of Employment Recommendation* make provision for income protection measures to a worker whose employment has been terminated.⁸¹⁸ These income protection measures are severance pay, social security benefits (such as unemployment insurance and assistance benefits) or both.⁸¹⁹

⁸¹³ Article 8(3).

⁸¹⁴ Article 15 of the *Termination of Employment Recommendation*.

⁸¹⁵ Article 11 of the *Termination of Employment Convention*.

⁸¹⁶ *Ibid.*

⁸¹⁷ Paragraph 16 of the *Termination of Employment Recommendation*.

⁸¹⁸ Article 12 of the *Termination of Employment Convention* and paragraph 18 of the *Termination of Employment Recommendation*.

⁸¹⁹ See, for a discussion of severance pay in South Africa, paragraph 3.2. in chapter 3.

Severance pay is based on the length of service and level of wages. It is paid directly by the employer or by a fund constituted by the employers' contribution.⁸²⁰

2.2.4.6. Additional measures for collective dismissals

The *Termination of Employment Convention* and the *Termination of Employment Recommendation* impose a variety of additional measures to be observed in a situation of collective dismissals. These measures, to some extent, emulate the recommendations of the *International Labour Conference's Resolution on Labour and Social Implications of Automation and other Technological Developments*.⁸²¹ These measures comprise the following: consultation of workers' representatives, notification to the competent authority, measures to avert or minimise termination, criteria for selection for termination, priority of rehiring and mitigating the effects of termination.

(a) Consultation of workers' representatives

In accordance with article 13 of the *Termination of Employment Convention* an employer contemplating to terminate employment on the basis of reasons of an economic, technological, structural or similar nature has an obligation to consult with workers' representatives. In order to enable the workers' representatives to participate meaningfully during the consultation process, an employer is required by article 13(1) to:

- provide the workers' representatives concerned⁸²² in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out; and

⁸²⁰ See, for further reading, ILOLEX "1995, Protection against unjustified dismissal: Severance allowance and other income protection" – accessed at <http://www.ilo.org>.

⁸²¹ International Labour Conference *Fifty-Seventh Session –1972: Record of Proceedings* (ILO (1972)) 602-607.

⁸²² Article 13(3) of the *Termination of Employment Convention* and paragraph 20(3) of the *Termination of Employment Recommendation* define the phrase 'workers' representatives concerned' to mean "the worker's representatives recognised as such by national law or practice, in conformity with the *Workers' Representatives Convention* (1971)."

- give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.
- (b) Notification to the competent authority

Alongside the duty to consult, the *Termination of Employment Convention* requires an employer contemplating terminations for reasons of an economic, technological, structural or similar nature to notify a “competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.”⁸²³ It should be noted, however, that national laws or regulations may limit the applicability of the foregoing provision to “cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.”⁸²⁴ Even though the Convention does not specify the rationale behind the notification to the competent authority, it is argued that: “Notification is generally intended to inform the authority of the terminations contemplated which might cause economic problems and place a burden on public expenditure and to enable them to help the parties concerned to find solutions to the problems raised by the contemplated terminations.”⁸²⁵ The foregoing assertion makes sense for the reason that it can be inferred from the recommendation by the *Termination of Employment Recommendation* that the competent authority should, where appropriate, assist the parties in seeking solutions to the problems raised by the terminations contemplated.⁸²⁶

⁸²³ Article 14(1) of the *Termination of Employment Convention*.

⁸²⁴ Article 14(2).

⁸²⁵ ILOLEX “1995, Protection against unjustified dismissal: Terminations of employment for economic, technological, structural or similar reasons” – accessed at <http://www.ilo.org>.

⁸²⁶ Paragraph 19(2).

(c) Measures to avert or minimise termination

To avert or minimise the adverse effects of the termination of employment, the *Termination of Employment Recommendation* recommends a variety of measures to be considered. These measures include, among others, the following: restriction of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work.⁸²⁷ It recommends further that: “Where it is considered that a temporary reduction of normal hours of work would be likely to avert or minimise terminations of employment due to temporary economic difficulties, consideration should be given to partial compensation for loss of wages for the normal hours not worked, financed by methods appropriate under national law and practice.”⁸²⁸

(d) Criteria for selection for termination

Provision for the selection criteria to be adopted during collective redundancies is provided for in the *Termination of Employment Recommendation*. According to this Recommendation, the selection criteria to be adopted in an event of collective redundancies should, wherever possible, be established in advance and must “give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers.”⁸²⁹

(e) Priority of rehiring

Employers are urged to exercise priority in rehiring employees with comparable qualifications who were made redundant. This priority in rehiring is, however, subject to such redundant employees having, within a given period from the time of their leaving, expressed a desire to be rehired.⁸³⁰ In addition, priority of rehiring may be limited to a

⁸²⁷ Paragraph 21 of the *Termination of Employment Recommendation*.

⁸²⁸ Paragraph 22.

⁸²⁹ Paragraph 23(1).

⁸³⁰ Paragraph 24(1).

specified period of time.⁸³¹ The rationale behind priority in rehiring is that “where an employer who has had to reduce his staff for any of the reasons mentioned may later have to hire staff once again, out of fairness a certain priority should be granted to the workers whose employment was previously terminated.”⁸³² It would, indeed, be unjust and morally wrong for an employer to terminate employment of workers only to hire a new batch of workers with the same qualifications shortly thereafter.

(f) Mitigating the effects of termination

In the event that collective redundancies are unavoidable, the *Termination of Employment Convention* and the *Termination of Employment Recommendation* clearly support the implementation of measures that would mitigate the adverse effects of collective redundancies. Article 13(1)(b) of the Convention, as pointed out earlier, on the one hand directs employers contemplating collective redundancies to consult with workers’ representatives on, among others, “measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.” The Recommendation, on the other hand, adds more flesh to the skeleton provided by the Convention on the subject of mitigating the effects of collective redundancies. According to paragraph 25 of the Recommendation: The placement of the workers affected in suitable alternative employment as soon as possible, with training or retraining where appropriate, should be promoted by measures suitable to national circumstances, to be taken by the competent authority, where possible with the collaboration of the employer and the workers’ representatives concerned.⁸³³ Furthermore, the employer should, where possible, assist the workers affected in the search for suitable alternative employment, for example, through direct contacts with other employers.⁸³⁴

In addition, the Recommendation provides that “consideration should be given to providing income protection during any course of training or retraining and partial or total

⁸³¹ Paragraph 24(2).

⁸³² ILOLEX “1995, Protection against unjustified dismissal: Terminations of employment for economic, technological, structural or similar reasons” – accessed at <http://www.ilo.org>.

⁸³³ Paragraph 25(1).

⁸³⁴ Paragraph 25(2).

reimbursement of expenses connected with training or retraining and with finding and taking up employment which requires a change of residence.”⁸³⁵ It provides further that the competent authority should consider providing financial resources to support in full or in part the measures aimed at mitigating the adverse effect of collective redundancies.⁸³⁶

(g) Some observations

The South African employment protection statutory framework is to a large extent in conformity with the *Termination of Employment Convention* (158 of 1982) (and even the *Termination of Employment Recommendation* 166 of 1982) – in spite of that country’s non-ratification of the aforesaid instrument. Nevertheless, it should be remarked that the ILO employment protection instruments tend to focus more on formal economy employment much to the neglect of informal economy workers. A similar approach towards the informal economy can, to a certain extent, be found in South Africa. This restricts the scope of coverage of something as crucial as employment protection. Notwithstanding the preceding assertions, the scope of application of unfair dismissals laws in South Africa is much broader than that contained in international standards: “Contrary to the flexibility recognised and extended by international standards through the mechanism of selective application, protection against unfair dismissal in South Africa extends to all workers, except those limited categories of persons excluded from the Act [*Labour Relations Act*] itself. Moreover, in South Africa, there is no qualifying period (workers enjoy protection against dismissal from the time that they have not started work), probationary employees are not excluded from protection (the protection they are afforded is more limited...) and no categories of workers are excluded on the basis of special problems arising from their conditions of employment.”⁸³⁷ Another point to be noted is that the *Termination of Employment Convention* requires employers contemplating collective dismissals to notify the competent authority.⁸³⁸ Nonetheless, it fails to specify the role of administration is supposed to play. It

⁸³⁵ Paragraph 26(1).

⁸³⁶ Paragraph 26(2).

⁸³⁷ Van Niekerk A “Regulating flexibility and small business: Revisiting the LRA and the BCEA – A Response to Halton Cheadle’s draft concept paper” (Unpublished Paper (2006)).

⁸³⁸ Article 14 of the *Termination of Employment Convention* 158 of 1982. This article “does not refer to the role of administration, but limits itself to emphasizing the need to communicate the timing and form of the dismissal

could be useful if this instrument could elaborate on this. The duty to notify the competent authority prior to retrenchments is not part of the retrenchment procedures in South Africa.

2.3. Other aspects fundamental to unemployment protection

2.3.1. Creation and promotion of productive employment

The creation and promotion of productive employment is crucial in an unemployment protection system. To this end, several international instruments require member states to place the promotion of full, productive and freely chosen employment at the top of their policy agenda.⁸³⁹ Measures anticipated to play a crucial role in this endeavour, alongside social security, include *employment services*, *vocational training* and *vocational guidance*.⁸⁴⁰ In South Africa there are public programmes (namely, public works programmes and the skills development programme) which are aimed at the creation and promotion of employment. Nonetheless, as shown in chapter 3 of this study, these programmes have their own shortcomings.⁸⁴¹ It is thus submitted that the South African government must, as a matter of urgency, address these shortcomings.

2.3.2. (Re)integration of unemployed persons

The (re)integration of unemployed person envisaged by international instruments encompasses two categories of unemployed persons. That is those individuals who have lost their employment as well as those individuals who are yet to enter the labour market. Within these two categories, there are sub-categories of persons who are liable to experiencing particular difficulties when trying to enter the labour market. These sub-categories include, among others, women, young workers, persons with disabilities, older workers, the long-term

of the dismissal, with an explanation of the reasons, and leaves it up to governments to decide on the most effective means of applying these provisions" (ILO *Termination of Employment Digest* (ILO (2000)) 29)

⁸³⁹ See, for example, the Preamble and Part II of the *Employment Promotion and Protection against Unemployment Convention* as well as Part II of the *Employment Promotion and Protection against Unemployment Recommendation*.

⁸⁴⁰ Article 7 of the *Employment Promotion and Protection against Unemployment Convention* and Par. 2 of the *Employment Promotion and Protection against Unemployment Recommendation*.

⁸⁴¹ See paragraphs 2.2.3. and 2.3.5. in chapter 3.

unemployed, migrant workers lawfully resident in the country and workers affected by structural change. Noting the plight of the foregoing groups, international standards urge member states to strive towards the establishment of special programmes to promote additional job opportunities and employment assistance and to encourage freely chosen and productive employment⁸⁴² for these groups of persons.⁸⁴³ In addition, member states are encouraged to endeavour to extend the promotion of productive employment progressively to a greater number of categories than the number initially covered.⁸⁴⁴

2.3.3. Extension of unemployment protection coverage

Member states are encouraged to progressively extend the scope of their unemployment protection systems to cover other groups and categories of persons not covered. The *Employment Promotion and Protection against Unemployment Convention* requires member states to “take account of the fact that there are many categories of persons seeking work who have never been, or have ceased to be, recognised as unemployed or have never been, or have ceased to be covered by schemes for the protection of the unemployed.”⁸⁴⁵ As a result, it encourages member states to ensure that at least three of the following categories of persons seeking work receive social assistance benefits: young persons who have completed their vocational training; young persons who have completed their studies; young persons who have completed their compulsory military services; persons after a period devoted to bringing up a child or caring for someone who is sick, disabled or elderly; persons whose spouse had died, when they are not entitled to survivors’ benefits; divorced or separated persons; released prisoners; adults, including persons with disabilities, who have completed a period of training; migrant workers on return to their home country, except in so far as they have acquired rights under the legislation of the country where they last worked; and previously self-employed persons.⁸⁴⁶ Furthermore, it requires every single member state to endeavour to

⁸⁴² See, for an interesting critique on the right to a freely chosen occupation, Van Langendonck J “From unemployment to labour market insurance” in Pieters D (ed) *Confidence and Changes: Managing Social Protection in the New Millennium* (Kluwer (2001)) 193 at 196-197.

⁸⁴³ Article 8(1) of the *Employment Promotion and Protection against Unemployment Convention*.

⁸⁴⁴ Article 8(3).

⁸⁴⁵ Article 26(1).

⁸⁴⁶ *Ibid.*

extend protection progressively to a greater number of categories than the number initially protected.⁸⁴⁷

Several assumptions can be drawn from preceding provisions of the *Employment Promotion and Protection against Unemployment Convention*. Firstly, by encouraging member states to progressively extend coverage, it seems this instrument acknowledges that it cannot be reasonably expected of countries such as South Africa to extend unemployment protection coverage to all excluded and marginalised groups and categories of persons overnight. The recent extensions of unemployment coverage in South Africa through sectoral determination,⁸⁴⁸ in spite of the criticism levelled against this approach, could be regarded as being in the spirit of this instrument. Nevertheless, more still needs to be done to extend coverage to a majority of the excluded groups of persons (inclusive of those individuals who eke a living in the informal economy). Thirdly, by requiring member states to provide social assistance benefits to certain categories of persons seeking work, it could be said that the Convention acknowledges that the brunt of unemployment is not only felt by those who are in the labour market but also by those individuals who are yet to enter the labour market as well as the long-term unemployed. In light of the foregoing assertions, it is submitted that South Africa should progressively widen the scope of coverage of both the unemployment insurance scheme and the social assistance scheme.

2.3.4. Unemployment protection coordination

Every member state has an obligation to co-ordinate its unemployment protection system as well as its employment policy.⁸⁴⁹ What is envisaged by this obligation, is that each member states shall strive towards ensuring that “its system of protection against unemployment, and in particular the methods of providing unemployment benefits, contribute to the promotion of full, productive and freely chosen employment, and are not such as to discourage employers

⁸⁴⁷ See article 4(b) and article 26(3) of the *Employment Promotion and Protection against Unemployment Convention* as well as paragraph 16 of the *Employment Promotion and Protection against Unemployment Recommendation*.

⁸⁴⁸ See paragraph 2.2.2.2. in chapter 3.

⁸⁴⁹ Article 2 of the *Employment Promotion and Protection against Unemployment Convention*.

from offering and workers from seeking productive employment.”⁸⁵⁰ In South Africa, the linkage between dismissal protection and unemployment protection measures is weak. For example, the South African employers are not required to notify a competent public authority about the impending collective dismissals. It is submitted that the notification of a public authority if linked with employment protection measures could be one of those ways in through linkages could be forged between employment policy and unemployment protection measures. This assertion is informed by the fact that the notification of a public authority is aimed at providing the authorities with an opportunity to prepare the labour market for the absorption of extra unemployed persons or to activate appropriate unemployment protection measures. The coordination of unemployment protection and employment policy is indeed one of those areas which the South African policy makers should look at when revamping the current unemployment protection system.

In addition, the *Employment Promotion and Protection against Unemployment Recommendation* directs that:

“Members should offer to protected persons, under prescribed conditions, facilities to enable them to engage in remunerated temporary employment without endangering the employment of other workers and with the purpose of improving their own chances of obtaining productive and freely chosen employment.”

It provides further that:

“Members should, in accordance, if appropriate, with provisions in multilateral agreements, invest any reserves accumulated by statutory pension schemes and provident funds in such a way as to promote and not to discourage employment within the country, and encourage such investment from private sources, including private pension schemes, while at the same time affording the necessary guarantees of security and yield of the investment.”

⁸⁵⁰ *Ibid.*

2.3.5. Partnership approach

It self-evident that (un)employment protection is not a matter that can be accomplished by the government alone. To this end, international standards, while acknowledging the importance of government in an (un)employment protection system, expressly favour a partnership approach in the quest to provide (un)employment protection. They encourage social partners to work together in a number of crucial (un)employment protection related issues such as employment and training policies.⁸⁵¹ A partnership approach in the (un)employment sphere is weak in South Africa. Accordingly, it is submitted that South Africa could learn from the German experience in this regard. In Germany, social partners work together in their endeavours to promote employment.⁸⁵²

2.3.6. Some observations

In view of the above discussion, it could be observed that the ILO international instruments undoubtedly envisage the adoption of a comprehensive and integrated unemployment protection system by member states. This is evident from a host of measures proposed in ILO international standards, such as the creation and promotion of productive employment, (re)integration of unemployed persons into the labour market, the extension of unemployment protection coverage, and unemployment protection coordination (policies and schemes). Apart from the foregoing, the ILO is also striving at ensuring decent work, i.e. the creation not only of jobs, but of jobs of acceptable quality.⁸⁵³ There have been some

⁸⁵¹ See ILOLEX “2004, Promoting employment: Chapter V – Involvement of the social partners in the design and implementation of policies” – accessed at <http://www.ilo.org>.

⁸⁵² See paragraph 2.2.4.3. in chapter 5.

⁸⁵³ See Ghai D “Decent work: Concept and indicators” (2003) 142 *International Labour Review* 113, Anker R *et al* “Measuring decent work with statistical indicators” (2003) 142 *International Labour Review* 147, Bescond D *et al* “Seven indicators to measure decent work: An international comparison” (2003) 142 *International Labour Review* 179, Bonnet F *et al* “A family of decent work indexes” (2003) 142 *International Labour Review* 213, Fields GS “Decent work and development policies” (2003) 142 *International Labour Review* 239, Ahmed I “Decent work and human development” (2003) 142 *International Labour Review* 263, Ghai D *Decent Work: Concepts, Models and Indicators* (International Institute for Labour Studies Discussion Paper 139/2002 (2002)), Standing G “From People’s Security Surveys to a Decent Work Index” (2002) 141 *International Labour Review* 441, Hepple B “Equality and empowerment for decent work” (2001) 140 *International Labour Review* 5, Saget C “Poverty reduction and decent work in developing countries: Do minimum wages help?” (2001) 140 *International Labour Review* 237, Sen A “Work and rights” (2000) 139 *International Labour Review* 119 and ILO *Decent Work* (ILO (1999)).

remarkable efforts in South Africa to improve the current unemployment protection system. For example, some previously excluded groups of workers (e.g. domestic sector and taxi sector workers⁸⁵⁴) were brought within the ambit of the unemployment insurance framework. Social partners, on the other hand, have met on several occasions⁸⁵⁵ in an attempt to formulate ways and means to address the South Africa's unemployment problem. Nevertheless, measures to create and promote employment, to (re)integrate the unemployed persons into the labour market and to co-ordinate unemployment protection and employment policies remain weak or absent. South Africa should, as matter of urgency, redesign its unemployment protection system so as to ensure that it (adequately) links income security and employment protection and promotion.

3. EUROPEAN UNION

3.1. Introduction

3.1.1. Aims and purposes of the European Union

The European Union (EU) is a *supranational organisation* comprising of 25 member states.⁸⁵⁶ The signing of the *Treaty on the European Union* (commonly referred to as the Maastricht Treaty) in 1992 resulted in the European Coal and Steel Community (ECSC), the European Atomic Energy Community (EURACOM) and the European Economic Community (EEC) being consolidated to form the European Union (EU).⁸⁵⁷ This supranational organisation, *inter alia*, aims to promote economic and social progress and a

⁸⁵⁴ See Dancaster L "Domestic workers and the law" (2003) 27 *South African Journal of Labour Relations* 109 and Mpedi LG "Extending social security and labour law protection to the South African informal sector – an Enquiry into recent developments in the taxi sector" (2006) 9 *Recht in Afrika* 43.

⁸⁵⁵ For example, the Presidential Job Summit 30 October 1998. Information pertaining to this summit is accessible at <http://www.nedlac.org.za> and <http://www.polity.org.za>.

⁸⁵⁶ These 25 member states are Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

⁸⁵⁷ See, for an interesting account of the evolution of the European Union, Cairns W *Introduction to European Union Law* (2nd ed) (Cavendish (2002)) 13-24, Raworth P *Introduction to the Legal System of the European Union* (Oceana (2001)) 1-19, Burgess M "Introduction: Federalism and building the European Union" (1996) 26 *Publius: Journal of Federalism* 1 and Willis FR "Origins and evolution of the European Communities" (1978) 440 *Annals of the American Academy of Political and Social Science* (The European Community after Twenty Years) 1.

high level of employment and to achieve balanced and sustainable development; strengthen the protection of the rights and interests of the nationals of its member states through the introduction of a citizenship of the Union; and maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.⁸⁵⁸ The EU has the following institutions, namely the European Parliament, the Council of the European Union (representing the individual member states), the European Commission (seeking to uphold the interests of the Union as a whole), the Court of Justice (upholding the rule of European law) and the Court of Auditors (checking the financing of the Union's activities).⁸⁵⁹ The foregoing institutions are flanked by the European Economic and Social Committee,⁸⁶⁰ the Committee of the Regions,⁸⁶¹ the European Central Bank,⁸⁶² the European Ombudsman⁸⁶³ and the European Investment Bank.⁸⁶⁴ There are, apart from the aforementioned, other agencies and bodies which complete the system.⁸⁶⁵

3.1.2. Nature and form of European Union Law: A social policy perspective

The EU law has, *inter alia*, the following characteristics: Firstly, the legal system of the EU does not draw a formal line of demarcation between the executive and legislative powers.⁸⁶⁶ Secondly, the EU law comprises three parts, i.e. the primary legislation (treaties), secondary legislation (e.g. regulations, directives, recommendations and opinions of the EU's

⁸⁵⁸ Article 2 of the *Treaty on European Union (Consolidated Version)* (*Official Journal of the European Communities* C325/5, 24 December 2002) – accessed at http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002M/pdf/12002M_EN.pdf.

⁸⁵⁹ Article 7(1) of the *Treaty establishing the European Community (Consolidated Version)* (*Official Journal of the European Communities* C325/33, 24 December 2002) – accessed at http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/pdf/12002E_EN.pdf, European Union “European Union institutions and other bodies” – accessed at http://europa.eu.int/institutions/index_en.htm, Cairns W *Introduction to European Union Law* (2nd ed) (Cavendish (2002)) 25-51 and Raworth P *Introduction to the Legal System of the European Union* (Oceana (2001)) 61-98.

⁸⁶⁰ Article 7(2) of the *Treaty establishing the European Community*.

⁸⁶¹ *Ibid.*

⁸⁶² Article 8 of the *Treaty establishing the European Community*.

⁸⁶³ Article 195.

⁸⁶⁴ Article 9.

⁸⁶⁵ See European Union “European Union institutions and other bodies” – accessed at http://europa.eu.int/institutions/index_en.htm.

⁸⁶⁶ Raworth P *Introduction to the Legal System of the European Union* (Oceana (2001)) 111.

institutions in accordance with the treaties) and decisions of the European Court of Justice.⁸⁶⁷ In addition, the EU law comprises of binding and non-binding rules. All treaty law, regulations and directives are binding on member states. Recommendations and opinions, on the other hand, have no binding force. Fourthly, a provision of the EU law may be directly applicable or directly effective or both. ‘Direct applicability’ means that “a provision of Union law takes effect in the legal orders of the Member States without the need for national or union implementation and as such is automatically binding throughout the European Union from the time of its entry into force.”⁸⁶⁸ ‘Direct effect’, on the other hand, “refers to the capacity of a provision of Union law to create rights for natural or legal persons that can be enforced by national courts.”⁸⁶⁹ Another important characteristic of the EU law is that it (in the area(s) of EU law competence) takes precedence over national law.⁸⁷⁰

Provisions relating to (un)employment protection in the EU can, in principal, be found in the primary legislation as well as secondary legislation. (Un)employment protection (-related) provisions contained in the primary legislation of the EU, include those that deal with free movement of persons,⁸⁷¹ employment policy⁸⁷² and social policy. Pursuant to these provisions, some secondary legislation as well as soft law⁸⁷³ concerned with (un)employment

⁸⁶⁷ See Cairns W *Introduction to European Union Law* (2nd ed) (Cavendish (2002)) 72-81 and Raworth P *Introduction to the Legal System of the European Union* (Oceana (2001)) 110-111.

⁸⁶⁸ Raworth P *Introduction to the Legal System of the European Union* (Oceana (2001)) 114-115. Also see, Cairns W *Introduction to European Union Law* (2nd ed) (Cavendish (2002)) 109-110.

⁸⁶⁹ *Ibid* 115. It should be noted that: “In order to be directly effective, a provision of Union law, regardless of its nature, must meet the following conditions: (a) the provision must establish rights for persons; (b) the rights must be clear and precise enough for the national courts to enforce; (c) these rights must be unconditional, in that they are not subject to any pre-condition that has not been fulfilled or any implementing measures or any delay that has not yet expired. In the case of implementing measures, this does not prevent unconditionality if the time for implementation has passed or the implementation has been done improperly; (d) the provision must not confer a discretion on the member states or Union bodies with respect to enjoyment of the rights. Negative obligations such as prohibitions are more easily seen as allowing no discretion, however this does not exclude positive obligations from having direct effect” (Raworth P *Introduction to the Legal System of the European Union* (Oceana (2001)) 115). Also see Cairns W *Introduction to European Union Law* (2nd ed) (Cavendish (2002)) 104-109.

⁸⁷⁰ See Cairns W *Introduction to European Union Law* (2nd ed) (Cavendish (2002)) 110-112 and Raworth P *Introduction to the Legal System of the European Union* (Oceana (2001)) 116-118.

⁸⁷¹ See article 2 of the *Treaty on European Union (Consolidated Version)* and articles 39-42 of the *Treaty establishing the European Community (Consolidated Version)*. Also see Cairns W *Introduction to European Union Law* (2nd ed) (Cavendish (2002)) 183-197.

⁸⁷² See Title VIII of the *Treaty establishing the European Community (Consolidated Version)*.

⁸⁷³ E.g. *Guidelines for the Employment Policies of the Member States*. See, for example, Council Decision of 4 October 2004 on *Guidelines for the Employment Policies of the Member States* (2004/740/EC) – *Official Journal of the European Communities* L326/45, 29 October 2004; Council Decision of 22 July 2003 on

protection has seen the light of day. This secondary legislation includes social security coordination instruments,⁸⁷⁴ social security discrimination instruments⁸⁷⁵ and employment protection instruments.⁸⁷⁶

Guidelines for the Employment Policies of the Member States (2003/578/EC) – *Official Journal of the European Communities* L197/13, 5 August 2003; Council Decision of 18 February 2002 on *Guidelines for Member States' Employment Policies for the Year 2002* (2002/177/EC) – *Official Journal of the European Communities* L60/60, 1 March 2002 and “Commission Communication: Proposal for guidelines for Member States employment policies 1998” – accessed at http://europa.eu.int/comm/employment_social/elm/summit/en/papers/guide.htm. Also see Goetschy J “The European employment strategy from Amsterdam to Stockholm: Has it reached its cruising speed?” (2001) 32 *Industrial Relations Journal* 401.

⁸⁷⁴ They include the Regulation (EEC) 1408/71 of the Council of 14 June 1971 on the *Application of Social Security Schemes to Employed Persons and their Families moving within the Community* (the Council Regulation 1408/71/EEC), the Council Regulation 574/72 of 21 March 1972 *Laying down the Procedure for Implementing Regulation 1408/71/EEC*, the Council Directive 98/49/EC of 29 June 1998 on *Safeguarding the Supplementary Pension Rights of Employed and Self-employed Persons moving within the Community* and the Regulation 883/2004/EC of the European Parliament and the Council of 29 April 2004 on the *Co-ordination of Social Security Systems* (the European Parliament and the Council Regulation 883/2004/EC). See, generally, Verschueren H “The relationship between Regulation (EEC) 1612/68 and Regulation (EEC) 1408/71 analysed through ECJ Case law on frontier workers” (2004) 6 *European Journal of Social Security* 7, Jorens Y and Schulte B “The implementation of Regulation 1408/71 in the Member States of European Union” (2001) 3 *European Journal of Social Security* 237 and Jorens Y *et al* “Co-ordination of the social security systems and the accession of Central and Eastern European countries to the European Union” (1999) 1 *European Journal of Social Security* 269.

⁸⁷⁵ They include the Council Directive 79/7/EEC of 19 December 1978 on the *Progressive Implementation of the Principle of Equal Treatment for Men and Women in matters of Social Security* (the Council Directive 79/7/EEC), the Council Directive 86/378/EEC of 24 July 1986 on the *Implementation of the Principle of Equal Treatment for Men and Women in Occupational Social Security Schemes* (the Council Directive 86/378/EEC) and the Council Directive 86/613/EEC of 11 December 1986 on the *Application of the Principle of Equal Treatment between Men and Women engaged in an activity, including Agriculture, in a Self-employed capacity, and on the Protection of Self-employed Women during Pregnancy and Motherhood* (the Council Directive 86/613/EEC).

⁸⁷⁶ They include the Council Directive 98/59/EC of 20 July 1998 on the *Approximation of the Laws of the Member States relating to Collective Redundancies* (the Council Directive 98/59/EC).

3.1.2.1. Free movement of persons

Citizens of the European Union⁸⁷⁷ have the right to move and reside freely within the territory of the member states.⁸⁷⁸ The *Treaty establishing the European Community* guarantees freedom of movement for all workers within the European Community.⁸⁷⁹ The foregoing freedom entails, in accordance with article 39(2) of the *Treaty establishing the European Community*, the abolition of any discrimination based on nationality between workers of the member states as regards employment, remuneration and other conditions of work and employment. In addition, it involves the right, subject to limitations justified on grounds of public policy, public security or public health: to accept offers of employment actually made; to move freely within the territory of member states for this purpose; to stay in a member state for the purpose of employment in accordance with the provisions governing the employment of nationals of that state laid down by law, regulation or administrative action; and to remain in the territory of a member state after having been employed in that state, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission. Article 42 of the *Treaty establishing the European Union (Consolidated Version)* requires the Council to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers so as to ensure the “aggregation, for the purpose of acquiring and retaining the right to benefit and of

⁸⁷⁷ The citizenship of the Union established by Article 17 of the *Treaty establishing the European Community* complements and does not replace national citizenship. See Raworth P *Introduction to the Legal System of the European Union* (Oceana (2001)) 35-38, Hellsten K “Access to social protection. Citizenship, Work, Residence” in Langer R and Sakslin M (eds) *Co-ordinating Work-based and Residence-based Social Security* (University of Helsinki (2004)) 21 at 29, Shaw J “The interpretation of European Union citizenship” (1998) 61 *Modern Law Review* 293, Closa C “Citizenship of the Union and nationality of Members States” in O’Keeffe D and PM Twomey (eds) *Legal Issues of Maastricht Treaty* (Chancery (1994)) 109, O’Keeffe D “Union citizenship” in O’Keeffe D and PM Twomey (eds) *Legal Issues of Maastricht Treaty* (Chancery (1994)) 87, Closa C “The concept of citizenship in the Treaty on European Union” (1992) 29 *Common Market Law Review* 1137 at 1140-1141 and Commission of the European Communities *Communication from the Commission: Free Movement of Workers – Achieving the Full Benefits and Potential* COM (2002) 694 final – accessed at http://europa.eu.int/eur-lex/en/com/cnc/2002/com2002_0694en01.pdf.

⁸⁷⁸ Article 18 of the *Treaty establishing the European Community (Consolidated)* and article 45 of the *Charter of Fundamental Rights of the European Union* (Official Journal of the European Communities C364/1, 18 December 2000). See, generally, Oliveira ÁC “Workers and other persons: Step-by-step from movement to citizenship – Case law 1995-2001” (2002) 39 *Common Market Law Review* 77.

⁸⁷⁹ Article 39(1) of the *Treaty establishing the European Community*. See Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families and Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

calculating the amount of benefit, of all periods taken into account under the laws of several countries” as well as the “payment of benefits to persons resident in the territories of Member States.”

In the light of article 42 of the *Treaty establishing the European Union (Consolidated Version)* and the fact that it would be futile to guarantee freedom of movement (particularly for workers) in the absence of any guarantees to their entitlement(s), claim(s) or expectation(s) to social security benefits as they move from one member state to another, Regulations (such the Council Regulation 1408/71/EEC and the European Parliament and the Council Regulation 883/2004/EC)⁸⁸⁰ were promulgated to co-ordinate social security schemes.⁸⁸¹ The coordination of social security schemes in the EU is primarily based on the following principles (which are discussed below): the equality of treatment, the unicity of the applicable legislation, the maintenance of acquired rights, exportability of benefits and the aggregation of periods of insurance. The goal of the aforesaid regulations is to co-ordinate⁸⁸²

⁸⁸⁰ It should be noted that social security systems in the Community have been co-ordinated by means of a regulation as long ago as 1958 (see Regulation 3 of the Council of 3 December 1958 and, generally, Ribas JJ “The experience of the European Economic Community in social security for migrants (1958-1967)” (1968) 3 *International Social Security Review* 424). Another important point to be kept in mind is that Regulation 883/2004/EC will not come into force until an implementing Regulation has been adopted (Pennings F “Co-ordination of social security on the basis of the state-of-employment principle: Time for an alternative?” (2005) 42 *Common Market Law Review* 67 at 67). A proposal for the aforesaid implementing Regulation is expected to be presented at the end of 2006 (“Towards an improved coordination of social security systems” – accessed at <http://europa.eu.int/scadplus/en/cha/c10521.htm>).

⁸⁸¹ Provision is (in certain instances and in the social security co-ordination context) made for third country nationals, i.e. nationals of states which are not members of the EU. See, for example, Council Regulation (EC) No. 859/2003 of 14 May 2003 which extended the provisions of Regulation (EEC) No. 1408/71 and Regulation (EEC) No. 574/72 to nationals of third countries who were excluded from coverage on the ground of their nationality. Also see Jorens Y and Schulte B (eds) *European Social Security Law and Third Country Nationals* (Die Keure (1998)). Apart from the foregoing there are agreements between the European Communities and their member states and third countries containing provisions related to social security. Some of these agreements make limited provision for social security co-ordination. Several categories of these agreements can be distinguished, and they include, *inter alia*, the following: Europe Agreements (Bulgaria and Romania), Euro-Mediterranean Association Agreements (Southern Mediterranean Region), Cooperation Agreements (Algeria, Lebanon and Syria), Cooperation and Customs Union Agreement (San Marino) and Association Agreement with Turkey. See, for example, Pennings F *Introduction to European Social Security Law* (4th ed) (Intersentia (2003)) 255-260, Centel T “The social security of the Turkish workers in Europe within the framework of the Association Agreement” in Jorens Y and Schulte B (eds) *European Social Security Law and third Country Nationals* (Die Keure (1998)) 281 and Gacon-Estrada H “The Cooperation Agreement concluded between the European Community and the Maghreb Countries (Algeria, Morocco and Tunisia)” in Jorens Y and Schulte B (eds) *European Social Security Law and Third Country Nationals* (Die Keure (1998)) 323.

⁸⁸² It should be recalled that article 140 of the *Treaty establishing the European Community (Consolidated)* requires the Commission to encourage cooperation between the member states and facilitate the co-ordination of their action in all social policy fields under Chapter 1 of Title XI of the *Treaty establishing the European*

and not to harmonise social security schemes⁸⁸³ of the EU member states.⁸⁸⁴ Consequently, member states are free to determine the details of their own social security systems inclusive of which benefits they shall provide, the conditions of eligibility and the value of the benefits.⁸⁸⁵ The foregoing is, however, subject to condition that they adhere to the basic principle of equality and non-discrimination.⁸⁸⁶

3.1.2.2. Employment policy

Title VIII of Part III of the *Treaty establishing the European Community (Consolidated)* has been specifically dedicated to the issue of unemployment. This Title (the Employment Title) requires member states as well as the Community to work towards developing a coordinated strategy for employment and particularly for promoting skilled, trained and adaptable workforce and labour markets responsive to economic change.⁸⁸⁷ Secondly, it directs the Community to “contribute to [a] high level of employment by encouraging cooperation between Member States and by supporting and, if necessary, complementing their action.”⁸⁸⁸ In its quest to contribute to a high level of employment, the Community is required to respect the competences of the member states.⁸⁸⁹ Thirdly, the Employment Title makes provision for the drawing up of Employment Guidelines which the member states are required to take into account in their implementation policies.⁸⁹⁰ Every member state is obliged to furnish the

Community, particularly in matters relating to, among others, the following: employment, basic and advanced vocational training; and social security.

⁸⁸³ The difference between co-ordination and harmonisation, according to Pennings (Pennings F *Introduction to European Social Security Law* (4th ed) (Intersentia (2003)) 7), is that “when national schemes are coordinated, they are left intact, which implies that the differences between national schemes remain. It supersedes, however, those national rules, and only those which are disadvantageous for migrant workers and self-employed persons. Harmonisation involves changes to national legislation for all employees (sometimes for all residents), not only for migrants.”

⁸⁸⁴ European Union (Employment and Social Affairs) “Coordination of social security schemes” – accessed at http://europa.eu.int/comm/employment_social/social_security_schemes/index_en.htm.

⁸⁸⁵ *Ibid.*

⁸⁸⁶ *Ibid.*

⁸⁸⁷ Article 125 of the *Treaty establishing the European Community (Consolidated)*.

⁸⁸⁸ Article 127 of the *Treaty establishing the European Community (Consolidated)*.

⁸⁸⁹ *Ibid.*

⁸⁹⁰ Article 128(2) of the *Treaty establishing the European Community (Consolidated)*. The employment guidelines are drawn up on the basis of the conclusions of the European Council, the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee, the Committee of the Regions and the Employment Committee (Article 128(2) of the *Treaty establishing the European Community (Consolidated)*).

Council and the Commission with “an annual report on the principal measures taken to implement its employment policies in light of the guidelines for employment.”⁸⁹¹ It is disappointing to note that failure by a member state to comply with the Employment Guidelines does not attract any genuine ‘sanctions’.⁸⁹² In addition, the Employment Title provides the Council with the discretion to “adopt incentive measures designed to encourage cooperation between member states and to support their action in the field of employment through initiatives aimed at developing exchanges of information and best practices, providing comparative analysis and advice as well as promoting innovative approaches and evaluating experiences, in particular by recourse to pilot projects.”⁸⁹³

3.1.2.3. Social Policy

(a) Fundamental objectives of European Union

Article 136 of the *Treaty establishing the European Community (Consolidated)* provides that the Community and the member states, having in mind fundamental social rights such as those set out in the *European Social Charter* (1961) and in the *Community Charter of the Fundamental Social Rights of Workers* (1989),⁸⁹⁴ shall have the following as their objectives:

⁸⁹¹ Article 128(3) of the *Treaty establishing the European Community (Consolidated)*.

⁸⁹² See Ashiagbor D *The European Employment Strategy: Labour Market Regulation and New Governance* (Oxford (2005)) 130 and Begg I and Berghman J “The future role of the EU in dealing with social exclusion: Policy perspectives” in Mayes DG *et al* (eds) *Social Exclusion and European Policy* (Edward Elgar 2001)) 306 at 309.

⁸⁹³ Article 129 of the *Treaty establishing the European Community (Consolidated)*. Nevertheless, the Employment Title proscribes the inclusion in these incentive measures of the harmonisation of laws and regulations of the member states (Article 129 of the *Treaty establishing the European Community (Consolidated)*).

⁸⁹⁴ These instruments envisage the provision of adequate social protection against social risks, which include unemployment. The *Community Charter of Fundamental Rights of Workers* provides every worker, in accordance with the arrangements applying in each country, with the right to adequate social protection as well as the right to enjoy an adequate level of social security benefits irrespective of his status and the size of the undertaking in which he is employed (article 10 of the *Community Charter of Fundamental Rights of Workers*). In addition, it requires that persons who have been unable either to enter or re-enter the labour market and have no means of subsistence should be able to receive sufficient resources and social assistance in keeping with their particular situation (article 10). The *Charter of Fundamental Rights of the European Union (Official Journal of the European Communities C363/1, 18 December 2000)*, on the other hand, provides that every family shall enjoy, *inter alia*, social protection (article 33). In addition, it provides that the Union recognises and respects the entitlement to social benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices (article 34(1)). Furthermore, it bestows persons

the promotion of employment, improved living and working conditions; the development of human resources with a view to lasting high employment; and the combating of exclusion. In a quest to achieve the aforesaid objective, the *Treaty establishing the European Community (Consolidated)* obliges the Community to support and complement the activities of the member states in, *inter alia*, the following areas: working conditions, the information and consultation of workers, the integration of persons excluded from the labour market and

residing and moving legally within the EU with an entitlement to social security benefits and social advantages in accordance with Community law and national laws and practices (article 34(2)). The *Charter of Fundamental Rights of the European Union* affirms further that the EU, in order to combat social exclusion and poverty, recognises and respects the right to social assistance (article 34(3)). The right to social assistance is aimed at ensuring a decent existence for all those who lack sufficient resources (article 34(3)). This provision is, however, subject to rules laid down by Community and national laws and practices (article 34(3)). As envisioned by, *inter alia*, the abovementioned instruments, member states of the EU operate a variety of contributory and/or non-contributory social protection schemes which are either directly and/or indirectly aimed at providing unemployment protection. These schemes include, among others, those that provide benefits for unemployment, sickness, maternity/paternity, and survivors (see Mutual Information System on Social Protection (MISSOC) *Social Protection in the Member States of the European Union, of the European Economic Area and in Switzerland – Situation on 1 May 2004* (European Commission (2005))). It should be borne in mind that these schemes vary from one member state to another in terms of, *inter alia*, types of benefits they provide, scope of coverage and eligibility conditions. Another important point to note is that the *Community Charter of Fundamental Rights of Workers* and the *Charter of Fundamental Rights of the European Union* are political declarations. As a result, they are not part of Community hard law. Nevertheless, they may be used by the European Court of Justice as an interpretative guide in litigation involving social and labour rights. In any event, the preamble of the *Treaty on the European Union (Consolidated)* makes reference to the *European Social Charter* (1961) and in the *Community Charter of the Fundamental Social Rights of Workers* (1989). Article 136 of the *Treaty establishing the European Community (Consolidated)* on the other hand, provides that the Community and the member states, having in mind fundamental social rights such as those set out in the *European Social Charter* (1961) and in the *Community Charter of the Fundamental Social Rights of Workers* (1989), shall have as their objectives the promotion of employment and improved living and working conditions. See De Witte B “The trajectory of fundamental social rights in the European Union” in De Búrca G and De Witte B (eds) *Social Rights in Europe* (Oxford (2005)) 152, Lang H “Soziale Grundrechte in der Charta der Grundrechte der Europäischen Union” in Stern K and Tettinger PJ (eds) *Die Europäische Grundrechte-Charta im wertenden Verfassungsvergleich* (Berliner Wissenschafts-Verlag (2005)) 305, Nußberger A “Sozialstandards in der Charta der Grundrechte der Union” in Stern K and Tettinger PJ (eds) *Die Europäische Grundrechte-Charta im wertenden Verfassungsvergleich* (Berliner Wissenschafts-Verlag (2005)) 323, Stergiou A “The protection of fundamental social rights within the European Union” in Sakellariopoulos T and Berghman J (eds) *Connecting Welfare Diversity within the European Social Model* (Intersentia (2004)) 189, Hervey TK and Kenner J (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Oxford (2003)), Bercusson B (ed) *European Labour Law and the EU Charter of Fundamental Rights – Summary Version* (European Trade Union Institute (2002)), Weiss M “Perspectives for European law and industrial relations” in Biagi M (ed) *Towards a European Model of Industrial Relations?* (Kluwer (2001)) 97 at 98-100, Blainpain R “The European top in Nice: An appraisal” in Blainpain R (ed) *Labour Law, Human Rights and Social Justice* (Kluwer (2001)) 121 at 128-133, Weiss M “Fundamental Social Rights for the European Union” in Blainpain R (ed) *Labour Law and Industrial Relations in the European Union* (Kluwer (1998)) 197, Hendrickx F “Fundamental rights in the EU” in Blainpain R (ed) *Institutional Changes and European Social Policies after the Treaty of Amsterdam* (Kluwer (1998)) 157 and Hepple B “The implementation of the Community Charter of Fundamental Social Rights” (1990) 53 *Modern Law Review* 643. Also see Betten L and Mac Devitt D *The Protection of Fundamental Social Rights in the European Union* (Kluwer (1996)) and Bercusson B “The European Community’s Charter of Fundamental Social Rights of Workers” (1990) 53 *Modern Law Review* 624.

equality between men and women with regard to labour market opportunities and treatment at work. Furthermore, it obliges the Commission to encourage co-operation between member states and facilitate the coordination of their action in areas such as *employment, labour law and working conditions, vocational training, social security, the right of association and collective bargaining* between employers and workers.⁸⁹⁵ It provides the Council with the discretion to adopt, by means of directives, minimum requirements for gradual implementation.⁸⁹⁶ Nonetheless, such directives should “avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.”⁸⁹⁷ In addition, article 137(2) of the *Treaty establishing the European Community (Consolidated)* grants the Council a discretionary power to adopt measures designed to encourage co-operation between member states through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences in order to combat social exclusion.

(b) European Social Fund

The European Social Fund, established in accordance with article 146 of the *Treaty establishing the European Community (Consolidated)*, has been hailed as the “main fund to have been established in the context of EU social policy.”⁸⁹⁸ This fund has been established so as to improve employment opportunities for workers in the internal market.⁸⁹⁹ Its primary goal is “to render the employment of workers easier and to increase their geographical and occupational mobility within the Community, and to facilitate their adaptation to industrial changes and to changes in production systems, in particular through vocational training and retraining.”⁹⁰⁰

⁸⁹⁵ Article 140 of the *Treaty establishing the European Community (Consolidated)*.

⁸⁹⁶ Article 137(2) of the *Treaty establishing the European Community (Consolidated)*.

⁸⁹⁷ *Ibid.*

⁸⁹⁸ Cairns W *Introduction to European Union Law* (2nd ed) (Cavendish (2002)) 275.

⁸⁹⁹ Article 146 of the *Treaty establishing the European Community (Consolidated)*. See, for further reading, Schulte B “Der ‘acquis communautaire’ im Arbeits- und Sozialrecht: Der Stand des Europäischen Arbeits- und Sozialrechts” in Ekonomi M *et al* (eds) *Der Einfluss internationalen Rechts auf das türkische und das deutsche Arbeits- und Sozialrecht* (Nomos (2003)) 139 at 152-158.

⁹⁰⁰ *Ibid.*

(c) Community powers to legislate in the area of social policy

One of the interesting points about the *Treaty establishing the European Community (Consolidated)* is that it incorporates the Social Chapter. The Social Chapter, which applies to all member states,⁹⁰¹ lays down the procedure and mechanisms through which decisions in the social policy field are to be adopted. Thus social policy decisions dealing with the improvement of the working environment to protect worker's health and safety; equality between men and women regarding labour market opportunities and treatment at work, and the integration of those excluded from the labour market are to be adopted according to qualified majority.⁹⁰² Those dealing with social security and protection of workers; protection of workers where their contract of employment is terminated; representation and collective defence of the interests of workers and employers, including co-determination; conditions of employment for third-country nationals legally residing in Community territory; financial contributions for promotion of employment and job creation are to be adopted by unanimous voting.⁹⁰³ The following issues are excluded from Community decision making: pay, the right of association, the right to strike and the right to impose lock-outs.⁹⁰⁴ The implication of this exclusion is that the "wage cost (i.e. pay and social security contributions) remains a purely national affair."⁹⁰⁵

⁹⁰¹ It should be remembered that in the beginning the United Kingdom opted out of the Protocol and Agreement on social policy (Official Journal C191 of 29 July 1992, 91). This opt-out was renounced by the new Labour government when it came into power. See, for further reading on this issue, Betten L "The role of social partners in the Community's social policy law-making: Participatory democracy or furthering the interests of small elites" in Engels C and Weiss M (eds) *Labour Law and Industrial Relations at the Turn of the Century* (Kluwer (1998)) 239 and Engels C and Salas L "Labour law and the European Union after the Amsterdam Treaty" in Blanpain R (ed) *Institutional Changes and European Social Policies after the Treaty of Amsterdam* (Kluwer (1998)) 73-87.

⁹⁰² Article 137(1)-(2) of the *Treaty establishing the European Community (Consolidated)*.

⁹⁰³ Article 137(3) of the *Treaty establishing the European Community (Consolidated)*.

⁹⁰⁴ Article 137(6) of the *Treaty establishing the European Community (Consolidated)*.

⁹⁰⁵ Blanpain R "The European Union, employment, social policy and the law" in Blanpain R (ed) *Institutional Changes and European Social Policies after the Treaty of Amsterdam* (Kluwer (1998)) 1 at 21.

(d) Equality of treatment and non-discrimination

The *Treaty establishing the European Community (Consolidated)* contains provisions dealing with the issue of equality and non-discrimination. Article 2 of the aforesaid instrument lists equality between men and women as one of the Community objectives. In addition, article 3(2)⁹⁰⁶ requires the Community to strive to eliminate inequalities, and to promote equality between men and women. Furthermore, article 13⁹⁰⁷ provides that: “Without prejudice to the other provisions of this Treaty, and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, region or belief, disability, age or sexual orientation.”⁹⁰⁸

The *Treaty establishing the European Community (Consolidated)* proscribes discrimination on the basis of gender. For instance, it requires member states to ensure that the principle of equal pay for male and female workers for equal work is applied.⁹⁰⁹ Furthermore, the *Treaty* empowers the Council after consulting the Economic and Social Committee, to adopt measures to ensure that the principle of equal treatment is applied.⁹¹⁰ Nonetheless, it should be stressed that the aforesaid measures may not take the form of strict quotas.⁹¹¹

⁹⁰⁶ *Treaty establishing the European Community (Consolidated)*.

⁹⁰⁷ *Ibid.*

⁹⁰⁸ Pursuant to this article several pieces of secondary legislation geared at the implementation or promotion of the equality principle were promulgated. Such secondary legislation includes, among others, the following: the Council Directive 2000/43/EC of 29 June 2000 *Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin* – this Directive proscribes direct indirect discrimination based on racial or ethnic origin and its scope embraces areas such as employment and working conditions (including dismissals and pay) and the Council Directive 2000/78/EC of 27 November 2000 *Establishing a General Framework for Equal Treatment in Employment and Occupation* – this Directive prohibits direct or indirect discrimination on the grounds of religion or belief, disability, age, or sexual orientation concerning employment and occupation and its scope encompasses issues such as employment and working conditions (including dismissals and pay).

⁹⁰⁹ Article 141(1) of the *Treaty establishing the European Community (Consolidated)*. Also see the Council Directive 75/117/EEC of 10 February 1975 on the *Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women*.

⁹¹⁰ Article 141(3) of the *Treaty establishing the European Community (Consolidated)*.

⁹¹¹ Strict quotas have been rejected by the European Court of Justice in *Eckhard Kalanke v Freie Hansestadt Bremen* (Case C-450/93 European Court Reports [1995] I-03051). The European Court of Justice held in this case that the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions precludes national rules, where candidates of different sexes short-listed for promotion are equally qualified, from automatically giving priority to women in sectors where they are under-represented.

The equality of treatment and non-discrimination principles contained in the *Treaty establishing the European Community (Consolidated)* can also be found in instruments such as the *Charter of Fundamental Rights of the European Union*,⁹¹² the *Charter of Fundamental Social Rights of Workers*,⁹¹³ the *European Social Charter* and the *Discrimination (Employment and Occupation) Convention* 111 of 1958.⁹¹⁴ These principles have been transferred to the social security sphere by instruments such as the Council Directive 79/7/EEC, the Council Directive 86/378/EEC and the Council Directive 86/613/EEC. The primary goal of the Council Directive 79/7/EEC is the progressive implementation of the principle of equal treatment⁹¹⁵ for men and women in the field of social security.⁹¹⁶ The Council Directive 86/378/EEC extends the principle of equal treatment to occupational social security schemes. This instrument is complimentary to the Council Directive 79/7/EEC. Their provisions are virtually identical.

3.1.3. Enforcement of the European Union law at a supranational level

The Commission has been entrusted with the task of ensuring that the *Treaty establishing the European Community (Consolidated)* and the measures taken by the institutions pursuant thereto are applied.⁹¹⁷ Articles 226 and 228 of the *Treaty* empower the Commission to take action against member states who fail to fulfil their EU law imposed obligations. The enforcement procedure, as laid down in article 226 and article 228, is as follows:

⁹¹² Article 23 of the *Charter of Fundamental Rights of the European Union* (Official Journal 2000 C364/1).

⁹¹³ Article 16 of the *Charter of Fundamental Social Rights of Workers* of 9 December 1989.

⁹¹⁴ See, generally, Bell M “The right to equality and non-discrimination” in Hervey TK and Kenner J (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Oxford (2003)) 91 and Costello C “Gender equalities and the Charter of Fundamental Rights of the European Union” in Hervey TK and Kenner J (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Oxford (2003)) 111 and Clauwaert S *Fundamental Social Rights in the European Union* (European Trade Union Institute (1998)).

⁹¹⁵ The principle of equal treatment means, according to article 4(1) of the Council Directive 79/7/EEC, “that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns: the scope of the schemes and the conditions of access thereto, the obligation to contribute and the calculation of contributions, the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.”

⁹¹⁶ Article 1 of the Council Directive 79/7/EEC.

⁹¹⁷ Article 211 of the *Treaty establishing the European Community (Consolidated)*.

- (a) If the Commission is of the opinion that the member state has failed to comply with an obligation imposed by the *Treaty establishing the European Community (Consolidated)*, it shall commence with the infringement procedure by serving a reasoned opinion on the matter after giving the member state concerned the opportunity to submit its observations.
- (b) In an event of non-compliance with the opinion, the Commission has the discretion to refer the matter to the European Court of Justice. The European Court of Justice is required to direct a non-complying member state to take the necessary steps to fulfil its obligations.
- (c) Failure to implement the decision of the European Court of Justice shall be responded to by a second Commission's reasoned opinion. This opinion outlines the points on which the member state concerned has failed to satisfy the European Court of Justice's judgment.
- (d) If the member state still refuses to comply, the Commission shall refer the matter once again to the European Court of Justice. In this case it is authorised to specify the amount of the lump sum or penalty to be paid by the recalcitrant member state concerned which it considers appropriate in the circumstances. The European Court of Justice has the discretion, if it rules that the member state concerned has failed to comply with its judgment, to impose a lump sum or penalty payment on such a state.⁹¹⁸

Despite the preceding enforcement procedure, a series of incidences involving the non-compliance by member states with EU law have been (and may continue to be) reported.⁹¹⁹ The effectiveness of the Commission in its quest to enforce EU law has been criticised for

⁹¹⁸ See, for further reading, Falkner G *et al* *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge (2005)) 201-228 and Börzel TA "Guarding the treaty: The compliance strategies of the European Commission" in Börzel TA and Cichowski RA (eds) *The State of the European Union: Law, Politics, and Society* (Oxford (2003)) 197.

⁹¹⁹ See, generally, Falkner G *et al* *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge (2005)) 201-228

the reason that it has a limited monitoring capacity.⁹²⁰ The point is that the Commission lacks the capability of detecting and legally pursuing all instances of non-compliance.⁹²¹ Nevertheless, it is reported that: "...once the Commission has detected violations against European law, it appears to be quite effective in bringing member states into compliance. Sooner or later member states obey European Law."⁹²² Another point of criticism, which is directed at the EU law enforcement procedure, is that its strategies to secure compliance have the potential of undermining each other's effects. For instance, "[i]f member states are willing to comply but lack the necessary capacities, financial penalties may reinforce rather than alleviate the problem."⁹²³

3.1.4. Some observations

Firstly, despite the social provisions contained in the *Treaty establishing the European Community (Consolidated)*, the EU (un)employment and social policy provisions are dispersed in a variety of instruments. Secondly, employment and social policies (such as those relating to, *inter alia*, social security and job security) fall largely within the domain of national competence. Thirdly, the reference to fundamental social rights by the *Treaty establishing the European Community (Consolidated)*, particularly those set out in the *European Social Charter* (1961) and in the *Community Charter of the Fundamental Social Rights of Workers* (1989) is symbolic. But, these instruments may be used as an interpretation tool by the European Court of Justice in cases involving social and labour rights. Furthermore, the *Treaty establishing the European Community (Consolidated)* makes provision for a situation whereby member states share, among others, information and best practices in order to combat social exclusion and/or in the field of employment. The Commission initiated the so-called 'peer review procedure'.⁹²⁴ The peer review procedure,

⁹²⁰ Börzel TA "Guarding the treaty: The compliance strategies of the European Commission" in Börzel TA and Cichowski RA (eds) *The State of the European Union: Law, Politics, and Society* (Oxford (2003)) 205.

⁹²¹ Börzel TA "Guarding the treaty: The compliance strategies of the European Commission" in Börzel TA and Cichowski RA (eds) *The State of the European Union: Law, Politics, and Society* (Oxford (2003)) 197 at 205.

⁹²² *Ibid* 218-219.

⁹²³ *Ibid* 220.

⁹²⁴ This is a procedure whereby member states are requested to "host reviews of their own programmes and to visit the programmes presented by other Member States" (Casey BH and Gold M "Peer review of labour market programmes in the European Union: What can countries really learn from one another?" (2005) 12 *Journal of European Public Policy* 26).

which is in line with the envisaged exchanging of information and best practices in the social policy field, has recently received unfavourable assessments from critics. For instance, it has been remarked that: “[T]he...process has evolved from a discursive operation to learn from each others best practices and to implement change, into a sort of ‘beauty contest’ showing one’s successes but omitting one’s failures. The ideas of ‘naming, blaming and shaming’ and the use of indicators and soft sanctions that the process seems to be built on, appear not to enforce compliance with plans and targets. The focus seems to lie much more on inputs than on outcomes and impacts. But instead of using indicators, a system of output evaluation would imply a shift towards a system of ‘diagnostic monitoring’.”⁹²⁵ Additionally, it is reported that “to date, there are few examples of policy learning and cross-national policy transfers for which reason there seems to be underutilisation of the learning potential.”⁹²⁶ Possible grounds for this situation are said to include the institutional constraints, attitudinal constraints, as well as administrative and financial constraints.⁹²⁷

3.2. Social security coordination

3.2.1. Principles of social security coordination

3.2.1.1. Fundamental principles of social security coordination – Regulation 1408/71⁹²⁸

Social security coordination rules in the EU are largely based on the following main principles:

- Equality of treatment. The equality of treatment principle is intended at ensuring that persons covered by the Regulation are treated similarly to the nationals of the member

⁹²⁵ Von Maydell B *et al Enabling Social Europe* (Springer (2006)) 109-110.

⁹²⁶ *Ibid* 110.

⁹²⁷ Casey BH and Gold M “Peer review of labour market programmes in the European Union: What can countries really learn from one another?” (2005) 12 *Journal of European Public Policy* 26 at 30-33.

⁹²⁸ The main principles of social security co-ordination as contained in Regulation 1408/71 are important for, among others, the reason that Regulation 1408/71 will remain in force and continue to have legal effect for the purpose of certain Community acts and agreements to which the Community is a party, in order to secure legal certainty (Preamble of Regulation 883/2004).

country in which they are insured. This principle is, in as far social security is concerned, set out in article 3 of the Regulation 1408/71. The principle of equality of treatment proscribes, in the light of the broad interpretation attached to it, both direct and indirect discrimination.⁹²⁹

- Unicity of the applicable legislation. The general rules pertaining to this principle are provided under Title II of Regulation 1408/71. These rules are aimed at averting a situation whereby a worker is insured in two or more states or not at all due to cross-border movement.⁹³⁰ A situation whereby a worker is insured in two member states could also lead to conflict between favourable and unfavourable social security laws and rules.⁹³¹ To circumvent these problems, persons to whom Regulation 1408/71 applies shall be subject to the legislation of a single member state only.⁹³² The applicable law is the law of the state of employment (*lex loci laboris*).⁹³³
- The principle of exportability of benefits. This principle is aimed at ensuring that persons who are already entitled to benefits or would be entitled to benefits do not lose their entitlement to benefits solely on the basis that they reside in the territory of another member state.⁹³⁴ This principle mainly applies to long-term benefits (e.g. pensions).⁹³⁵ Even so, it may apply (in certain instances) to short term benefits such as unemployment benefits.

⁹²⁹ Pennings F *Introduction to European Social Security Law* (4th ed) (Intersentia (2003)) 120-123.

⁹³⁰ Jorens Y and Schulte B "The implementation of Regulation 1408/71 in the Member States of the European Union" (2001) 3 *European Journal of Social Security* 237 at 240.

⁹³¹ Pigeon C "Reforms in the coordination of social security systems for people who move within the European Union" Paper presented at the International Social Security Association European Regional Meeting on Migrants and Social Protection, Oslo, 21-23 April 2004.

⁹³² Article 13 of Regulation 1408/71.

⁹³³ See, however, Pennings F "Co-ordination of social security on the basis of the state-of-employment principle: Time for an alternative?" (2005) 42 *Common Market Law Review* 67, Jorens Y and Schulte B "The implementation of Regulation 1408/71 in the Member States of the European Union" (2001) 3 *European Journal of Social Security* 237 at 241-244 and Christensen A and Malmstedt M "*Lex Loci Laboris* versus *Lex Loci Domicilli* – An inquiry into the normative foundations of European social security law" (2000) 2 *European Journal of Social Security* 69.

⁹³⁴ Pigeon C "Reforms in the coordination of social security systems for people who move within the European Union" Paper presented at the International Social Security Association European Regional Meeting on Migrants and Social Protection, Oslo, 21-23 April 2004.

⁹³⁵ See Article 10 of Regulation 1408/71.

- Aggregation of periods of insurance. The objective of this principle is to ensure that “periods of insurance, employment or residence completed under legislation of one Member State are taken into account, where necessary, for entitlement to benefits under the legislation of another Member State.”⁹³⁶

3.2.1.2. Recent modifications to the fundamental principles of social security coordination – Regulation 883/2004

Regulation 883/2004/EC, although it will not come into force until an implementing regulation has been adopted,⁹³⁷ has been adopted to modernise and simplify social security coordination.⁹³⁸ The need for such modernisation and simplification of coordination rules stems from, among others, the fact that Regulation 1408/71/EEC has been amended and updated on numerous occasions in order to take into account not only developments at Community level, including judgments of the Court of Justice, but also changes in legislation at national level – thus making coordination rules complex and lengthy.⁹³⁹ In its quest to modernise and simplify the social security coordination rules, Regulation 883/2004 has, *inter alia*, introduced, widened, modified and reinforced a variety of rules and principles relating to social security coordination. These modifications comprise of, among others, the following: Firstly, Regulation 883/2004 widened the scope of persons covered. The Regulation applies to nationals of a member states, stateless persons and refugees residing in a member state who are or have been subject to the legislation of one or more member states,

⁹³⁶ Pigeon C “Reforms in the coordination of social security systems for people who move within the European Union” Paper presented at the International Social Security Association European Regional Meeting on Migrants and Social Protection, Oslo, 21-23 April 2004.

⁹³⁷ Pennings F “Co-ordination of social security on the basis of the state-of-employment principle: Time for an alternative?” (2005) 42 *Common Market Law Review* 67 at 67.

⁹³⁸ It should be emphasised that the adoption of Regulation No. 883/2004/EC did not address all issues relating to the modernisation and simplification of co-ordination in the EU. Consult, for an instructive contribution in this regard, Pennings F “Co-ordination of social security on the basis of the state-of-employment principle: Time for an alternative?” (2005) 42 *Common Market Law Review* 67.

⁹³⁹ Preamble of the Regulation No. 883/2004/EC. Also see Pennings F “Inclusion and exclusion of persons and benefits in the new co-ordination regulation” in Spaventa E and Dougan M (eds) *Social Welfare and EU Law* (Hart (2005)) 241 at 242-243, Schulte B “Implementation of regulation 1408/71 – preparations by new member States” in Department of Social and Family Affairs, Ireland *Co-ordination of Social Security in an Enlarged Europe – Now and Tomorrow* (Department of Social and Family Affairs (2004)) 18 and Pigeon C “Reforms in the coordination of social security systems for people who move within the European Union” Paper presented at the International Social Security Association European Regional Meeting on Migrants and Social Protection, Oslo, 21-23 April 2004.

as well as to the members of their families and to their relatives.⁹⁴⁰ In addition, it applies to the survivors of persons who have been subjected to the legislation of one or more member states, irrespective of the nationality of such persons, where their survivors are nationals of a member states or stateless persons or refugees residing in one of the member states.⁹⁴¹ Secondly, it reinforced the equality of treatment principle by doing away ‘with the residency in a territory of a member state’ condition.⁹⁴²

Furthermore, it introduced the principle of assimilation of events. Article 5 of Regulation 883/2004 provides that: “Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply: (a) where, under the legislation of the competent member state, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another member state or to income acquired in another member state; (b) where, under the legislation of the competent member state, legal effects are attributed to the occurrence of certain facts or events, that member state shall take account of like facts or events occurring in any member state as though they had taken place in its own territory.” Fourthly, the Regulation fortified the principle of exportation of benefits by the waiving of residence rules. Cash benefits may not be “subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his family reside in a Member State other than that in which the institution for providing benefits is situated.”⁹⁴³

⁹⁴⁰ Article 2(1) of Regulation 883/2004. In light of this article, it is argued that the right of freedom of movement, viewed from a social security context, is no longer confined to employed persons and self-employed persons (Pennings F “Inclusion and exclusion of persons and benefits in the new co-ordination regulation” in Spaventa E and Dougan M (eds) *Social Welfare and EU Law* (Hart (2005)) 241 at 244).

⁹⁴¹ Article 2(2).

⁹⁴² See Article 4.

⁹⁴³ Article 7 of Regulation 883/2004.

3.2.2. Coordination of unemployment benefit schemes

3.2.2.1. Introduction

Both Regulations (that is Regulation 1408/71 and Regulation 883/2004) have a separate chapter dedicated to the coordination of unemployment benefits.⁹⁴⁴ These chapters address a variety of issues such as the aggregation of periods of insurance, or employment (or self-employment), calculation of unemployment benefits, exportation of unemployment benefits and payment of unemployment benefits to wholly and partially unemployed frontier workers.

3.2.2.2. Equality of treatment

The equality of treatment principle, which is one of the basic principles of social security coordination embodied by both Regulation 1408/71 and Regulation 883/2004,⁹⁴⁵ applies to all legislation concerning all social security branches inclusive of those providing unemployment benefits.⁹⁴⁶ It, generally speaking, entails that persons covered by the Regulations should be treated similarly to the nationals of the member country in which they

⁹⁴⁴ Chapter 6 of Regulation 1408/71 and Chapter 6 of Regulation 883/2004. Both Regulations have omitted to define the concept of 'unemployment benefits'. Consequently, the European Court of Justice (the Court) has been called upon on several occasions to adjudicate whether a particular benefit constituted an unemployment benefit or not. In *Doris Knoch v Bundesanstalt für Arbeit* (Case C-102/91 European Court Reports [1992] I-434) the Court ruled that unemployment benefits are those benefits that replace the remuneration which a person has lost due to unemployment and the object of the benefits is to provide for the maintenance of the person concerned. The Court held in *Genaro Acciardi v Commissie Beroepszaken Administratieve Geschillen in de Provincie Noord-Holland* (Case C-66/92 European Court Reports [1993] I-4567) that a Dutch benefit payable under the Law on Income for Older and Partially Incapacitated Unemployed persons could be regarded as an unemployment benefit. In *H. Meints v Minister van Landbouw, Natuurbeheer en Visserij* (Case C-57/96 European Court Reports [1997] I-6689) the Court ruled that a compensation for redundant agricultural workers was not an unemployment benefit. In addition, the Court in *Angelo Campana v Bundesanstalt für Arbeit* (Case 375/85 European Court Reports [1987] 2387) concluded that assistance for vocational training which concerns either persons who are already unemployed or persons who are still in employment but are actually threatened by unemployment is to be regarded as an 'unemployment benefit'. The Court observed further in *Bestuur der Bedrijfsvereniging voor de Metallnijverheid v L. J. Mouthaan* (Case 39/7 European Court Reports [1976] 1901) that benefits such as those under Title III A of the Netherlands Law on Unemployment the aim of which is to enable a worker who is owed wages following the insolvency of his/her employer to recover the amounts due to him/her within the limits laid down by that law do not constitute 'unemployment benefits'.

⁹⁴⁵ Article 3 of the Regulation 1408/71 and article 4 of the Regulation 883/2004.

⁹⁴⁶ Article 4(1) of Regulation 1408/71 and article 3(1) of Regulation 883/2004.

are insured. Discrimination, irrespective of whether it is direct or indirect, is prohibited.⁹⁴⁷ In *Bestuur van de Sociale Verzekeringsbank v J.M. Cabanis-Issarte*⁹⁴⁸ the European Court of Justice pointed out that “any derogation from equal treatment based on one of the provisions of [Regulation 1408/71] to which Article 3(1) refers must be objectively justified if the fundamental rule of non-discrimination laid down by Article 3(1) in the field of social security is not to be deprived of meaning.” Neutrally drawn conditions of entitlements could be declared in violation of the right to freedom of movement if, although at face value they appear to treat non-nationals and nationals equally, they are in reality prejudicial to non-nationals.⁹⁴⁹

3.2.2.3. Aggregation of periods of insurance or employment (or self-employment)

Both Regulations direct a competent institution⁹⁵⁰ of a member state whose legislation makes the acquisition, retention, recovery or duration of the right to benefit conditional upon completion of either a period of insurance, or employment (or self-employment) to take into account the periods of insurance, employment or self-employment completed under the legislation of any other member state as though they were completed under the legislation it applies.⁹⁵¹ The application of the preceding provisions is, in principle, conditional on the person concerned having the most recently completed periods of insurance, periods of employment or periods of self-employment in accordance with the legislation under which

⁹⁴⁷ See article 3(1) of the Regulation 1408/71. In *Carl Borawitz v Landesversicherungsanstalt Westfalen* (Case C-124/99 European Court Reports [2000] I-07293) the Court remarked that: “It is settled case-law that the principle of equal treatment, as laid down in that article, prohibits not only overt discrimination based on the nationality of the beneficiaries of social security schemes but also all covert forms of discrimination which, through the application of other distinguishing criteria, lead in fact to the same result.”

⁹⁴⁸ Case C-308/93 European Court Reports [1996] I-02097.

⁹⁴⁹ See, for example, *Doris Kaske v Landesgeschäftsstelle des Arbeitsmarktservice Wien* Case C-277/99 European Court Reports [2002] I-01261.

⁹⁵⁰ Article 1(q) of Regulation 883/2004 defines a ‘competent institution’ as “the institution with which the person concerned is insured at the time of the application for benefit; or the institution from which the person concerned is or would be entitled to benefits if he or a member of his family resided in the Member State in which the institution is situated; or the institution designated by the competent authority of the Member State concerned; or in case of a scheme relating to employer’s obligation in respect of the benefits set out in Article 3(1) [i.e. sickness benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits, survivors’ benefits, benefits in respect of accidents at work and occupational diseases, death grants, *unemployment benefits*, pre-retirement benefits and family benefits], either the employer or the insurer involved or, in default thereof, the body or authority designated by the competent authority of the Member State concerned.”

⁹⁵¹ Article 67(1) of Regulation 1408/71 and Article 61(1) of Regulation 883/2004.

the benefits are claimed.⁹⁵² Accordingly, it is permissible for a member state to refuse to grant a worker unemployment benefit for more than the maximum period of three months when the worker has not completed periods of insurance or employment, immediately prior to claiming unemployment benefit, in that member state.⁹⁵³

3.2.2.4. Calculation of unemployment benefits

The calculation of unemployment benefits is provided for in article 68 of Regulation 1408/71 and article 62 of Regulation 883/2004. Regulation 1408/71 requires a competent institution whose legislation requires that the calculation of benefits should be based on the amount of the previous wage or salary to take into account exclusively the wage or salary received by the person concerned in respect of his last employment in the territory of that state.⁹⁵⁴ It provides further that, in a case of a person whose last employment had been in that territory for less than four weeks, the benefits shall be calculated on the basis of the normal wage or salary corresponding, in the place where the unemployed person is residing or staying, to an equivalent or similar employment to his last employment in the territory of another member state.⁹⁵⁵ Apart from the foregoing, Regulation 1408/71 makes provision for those member states whose legislation requires that the amount of benefits varies with the number of members of a family. In such a situation, article 68(2) of the Regulation directs the competent institution to take members of the family of the person concerned who are residing in the territory of another member state into account.⁹⁵⁶

Regulation 883/2004, on the other hand, prescribes that “competent institutions of Member States whose legislation provides for the calculation of benefits on the basis of the previous salary or professional income shall take into account exclusively the salary or professional

⁹⁵² Article 67(3) of Regulation 1408/71 and Article 61(2) of Regulation 883/2004.

⁹⁵³ *Jan van Noorden v Association pour l'Emploi dans l'Industrie et le Commerce (Assedic) de l'Ardèche et de la Drôme* (Case C-272/90 European Court Reports [1991] I-02543).

⁹⁵⁴ Article 68(1) of Regulation 1408/71.

⁹⁵⁵ *Ibid.*

⁹⁵⁶ See *Genaro Acciardi v Commissie Beroepszaken Administratieve Geschillen in de Provincie Noord-Holland* (Case C-66/92 European Court Reports [1993] I-4567). Also see Pennings F *Introduction to European Social Security Law* (4th ed) (Intersentia (2003)) 236-239 and Van der Mei AP “Freedom of movement for the unemployed and co-ordination of unemployment benefit schemes” (2003) 5 *European Journal of Social Security* 214 at 222-224.

income received by the person concerned in respect of his last activity as an employed or self-employed person under the said legislation.”⁹⁵⁷ The foregoing applies also in the case where the “legislation administered by the competent institution provides for a specific reference period for the determination of the salary which serves as a basis for the calculation of benefits and where, for all or part of that period, the person concerned was subject to the legislation of another Member State.”⁹⁵⁸ In the case of frontier workers,⁹⁵⁹ the Regulation requires the institution of the place of residence to take into account the salary or professional income received by the person concerned in the member state to whose legislation he was subject during his last activity as an employed or self-employed person.⁹⁶⁰

3.2.2.5. Exportation of unemployment benefits

Unemployed EU citizens have, as a part of the free movement of workers, the right to travel to other member states to seek employment.⁹⁶¹ In line with this right, article 69(1) of Regulation 1408/71 and article 64(1) of Regulation 883/2004 make provision for the export of benefits. The right to export benefits bestowed by the two Regulations is subject to conditions. A person exercising the aforementioned right must be wholly unemployed;⁹⁶² satisfy the conditions in the legislation of the competent state of entitlement to benefit;⁹⁶³ before his departure, the unemployed person must have been registered as a person seeking work and have remained available to the employment services of the competent member state for at least four weeks after becoming unemployed;⁹⁶⁴ register, within a period of seven days, as a person seeking work with the employment services of the member state to which

⁹⁵⁷ Article 62(1) of Regulation 883/2004.

⁹⁵⁸ Article 62(2) of Regulation 883/2004.

⁹⁵⁹ Article 1(a) Regulation 883/2004 defines a ‘frontier worker’ as “any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he returns as a rule daily or at least once a week.” The European Court of Justice assessing the meaning of ‘frontier work’ decided in *Anna Bergemann v Bundesanstalt für Arbeit* (Case 236/87 European Court Reports [1988] 05125) that “a worker who, in the course of his last employment, transfers his residence to another Member State and who, after that transfer, no longer returns to the State of employment in order to pursue an occupation there, cannot be regarded as a ‘frontier worker’ within the meaning of Articles 1(b) and 71(1)(a)(ii) of Regulation No 1408/71.”

⁹⁶⁰ Article 62(3) of Regulation 883/2004.

⁹⁶¹ *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* Case C-292/89 European Court Reports [1991] I-745.

⁹⁶² Article 69(1) of Regulation 1408/71 and article 64(1) of Regulation 883/2004.

⁹⁶³ *Ibid.*

⁹⁶⁴ Article 69(1)(a) of Regulation 1408/71 and article 64(1)(a) of Regulation 883/2004.

he goes and be subject to the control procedure in that state.⁹⁶⁵ An unemployed person must return to the competent state before the expiry of the period (i.e. three months period) during which he/she is entitled to benefits.⁹⁶⁶ But, article 64(3) of Regulation 883/2004 does provide the competent state with a discretion to extend the aforesaid period to a maximum of six months.⁹⁶⁷ Failure to return to the competent state prior to the expiry of the period of entitlement to benefits may result in the unemployed person concerned losing the entitlement to benefits in the competent state.⁹⁶⁸ This, so it appears, is calculated at preventing abuse.⁹⁶⁹ Even so, it must be said that the provision relating to the possibility of losing the entitlement to benefits (by the unemployed persons due to failure to return to the competent state prior to the expiry of the entitlement period) is at times objectionable. The truth of the matter is that “this can involve the loss of potentially long periods of benefit” in view of the fact that “the claimant loses all remaining benefit rights.”⁹⁷⁰ Another point to be observed is that:

“...it is practically impossible for an unemployed worker really to go to another country and look for work there. As soon as he gets to know the country a little bit and finds his way around, he will have to go back. The regulation is clearly made in the perspective of free movement of workers only when they are hired by an employer in another country. It does not seem right that free movement for a worker (employed or not) should be decided by the employer. The community has everything to gain from a really free movement of workers who, when in need of employment, can go all around the community and offer their services to the employers where they are to be found.”⁹⁷¹

⁹⁶⁵ Article 69(1)(b) of Regulation 1408/71 and article 64(1)(b) of Regulation 883/2004.

⁹⁶⁶ Article 69(2) of Regulation 1408/71 and article 64(2) of Regulation 883/2004.

⁹⁶⁷ The competent state may in exceptional cases extend the three months period during which the unemployment benefit may be exported. This has been confirmed in by the European Court of Justice in *Giovanni Coccioni v Bundesanstalt für Arbeit* (Case 139/78 European Court Reports [1979] 00991).

⁹⁶⁸ Article 69(2) of Regulation 1408/71 and article 64(2) of Regulation 883/2004.

⁹⁶⁹ As Viaene J *et al* (Viaene J *et al* “Prevention and related policy issues” in Berghman J and Cantillon B (eds) *The European face of Social Security* (Avebury (1993)) 281 at 316) put it: “After three months [unemployed persons] have – if they have not found work – to return immediately to the original country where they lost their job, or they risk to loose all entitlement to benefits. The reason for this regulation is clear: the fear that ‘professional unemployed’ will transfer their residence to pleasant places such as Greece, Italy, Spain or Portugal and a good time on the basis of their unemployment benefits, which will be amply sufficient for their needs, given the standard of living of these places, and with the certainty that no work is to be found there.”

⁹⁷⁰ Pennings F “Inclusion and exclusion of persons and benefits in the co-ordination regulation” in Spaventa E and Dougan M (eds) *Social Welfare and EU Law* (Hart (2005)) 241 at 259.

⁹⁷¹ Viaene J *et al* “Prevention and related policy issues” in Berghman J and Cantillon B (eds) *The European face of Social Security* (Avebury (1993)) 281 at 316-317.

3.2.2.6. Unicity of applicable legislation

Both Regulations make provision for the payment of unemployment benefits to frontier workers. They distinguish between frontier workers who are partially or intermittently unemployed and frontier workers who are wholly unemployed.⁹⁷² A partially or intermittently unemployed frontier worker shall, in terms of article 71(1)(a)(i) of Regulation 1408/71 and article 65(1) of Regulation 883/2004, receive unemployment benefits in accordance with the provisions of the legislation of the competent member state as if he were residing in that member state. These benefits shall, as required by both Regulations, be provided by the institution of the competent member states.⁹⁷³ The competent member state is principally the state of employment. This is primarily due to the fact that the person concerned is still employed and as a result he or she is covered in accordance with the state of employment principle.⁹⁷⁴ The Regulations do not define what they meant by ‘partially unemployed’ or ‘wholly unemployed’. The European Court of Justice was called-upon to interpret these terms in *R.J. de Laat v Bestuur van het Landelijk instituut sociale verzekeringen*.⁹⁷⁵ In the case the European Court of Justice ruled that:

“In order to determine whether a frontier worker is to be regarded as partially unemployed or wholly unemployed within the meaning of Article 71(1)(a) of Council Regulation (EEC) No 1408/71 of 14 June 1971...uniform Community criteria must be applied. That assessment may not be made on the basis of criteria drawn from national law. If, in a Member State other than that in whose territory he resides, a worker remains in employment with the same undertaking, but part-time, while remaining available for work on a full-time basis, he is partially unemployed and the related benefits are to be provided by the competent institution of that State. On the other hand, if a frontier worker no longer has any link with that State and is wholly unemployed, those benefits are to be provided by the institution of the place of residence at its own expense.”

A wholly unemployed frontier worker shall, as pointed out by article 71(1)(a)(ii) of Regulation 1408/71, receive benefits in accordance with the provisions of the legislation of the member state in whose territory he or she resides as though he or she had been subject to

⁹⁷² Article 71 of Regulation 1403/71 and article 65 of Regulation 883/2004.

⁹⁷³ Article 71(1)(a)(i) of Regulation 1408/71 and article 65(1) of Regulation 883/2004.

⁹⁷⁴ Pennings F *Introduction to European Social Security Law* (4th ed) (Intersentia (2003)) 227.

⁹⁷⁵ Case C-444/98 European Court Reports [2001] I-02229.

that legislation while last employed. This provision is criticised on the basis that it deprives the wholly unemployed frontier workers, who wish to avail themselves for the employment services of the state of employment, of the rights they acquired in accordance with the legislation of the state of employment.⁹⁷⁶ Another unsatisfactory element is that state of residence bear the brunt of financing the benefit bill despite the fact that the contributions towards the unemployment insurance were paid in another state.⁹⁷⁷ This is problematic for the less affluent member states – particularly those that have recently joined the EU.⁹⁷⁸ Article 71(1)(a)(ii) of Regulation 1408/71 provides further that unemployment benefits shall be provided by the institution of the place of residence at its own expense.⁹⁷⁹ Provisions embodied in Regulation 883/2004 impose a duty on a wholly unemployed person who resided in a member state other than the competent member state and who continues to reside in the member state or returns to that member state to make him/herself available to the employment services in the member state of residence.⁹⁸⁰ In addition, it provides a wholly unemployed person with the discretion, as a supplementary step, to make him/herself available to the employment services of the member states in which he pursued his last activity as an employed or self-employed person.⁹⁸¹

3.2.4. Some observations

As is apparent from the foregoing discussion, there are some interesting developments geared at the modifications to the fundamental principles of social security coordination. These developments which were ushered in by the adoption of Regulation 883/2004 include the following: the widening of the scope of persons covered (to include, *inter alia*, stateless persons and refugees residing in a member state who are or have been subject to the legislation of one or more member states, as well as to the members of their families and to their relatives), the strengthening of the equality of treatment principle (by doing away with the ‘residency in a territory of a member state’ condition), the introduction of the principle of

⁹⁷⁶ Pennings F *Introduction to European Social Security Law* (4th ed) (Intersentia (2003)) 227.

⁹⁷⁷ *Ibid* 227-228.

⁹⁷⁸ *Ibid* 228.

⁹⁷⁹ Article 71(1)(a)(ii) of Regulation 1408/71.

⁹⁸⁰ Article 65(2) of Regulation 883/2004.

⁹⁸¹ *Ibid*. This discretion is, however, without prejudice to the provisions contained in article 64 of Regulation 883/2004 making provision for unemployed persons going to another member state in order to seek work.

assimilation of events and the fortification of the principle of exportation of benefits (by the waiving of residence rules). In light of the factors that necessitated these modifications (i.e. the fact that Regulation 1408/71/EEC has been amended and updated on numerous occasions in order to take into account not only developments at Community level, including judgments of the Court of Justice, but also changes in legislation at national level – thus making coordination rules complex and lengthy) it could be said social coordination rules are not (and should not be viewed) as inert rules. The reason is that they need to be adapted time and again so as to ensure that they reflect the legal (and other) developments in the states they serve.

Despite that, there are some issues – particularly in the unemployment sphere – which are (still) regulated in an unsatisfactory manner. For instance, failure to return to the competent state prior to the expiry of the period of entitlement to benefits may result in the unemployed person concerned losing the entitlement to benefits in the competent state. Firstly, it is true there are exceptions to this provision. Nonetheless, the three months period, it is opined, seems to be an unrealistic period through which an individual can reasonably (be expected to) search and secure employment in a ‘new’ country. This assertion should be understood in light of, for example, the shortage of employment currently discernable in member states. Additionally, job-hunting – starting from the search for suitable vacancies to the moment when one is offered or denied a position with an employer – is, in some instances and depending on the kind of employment sought, a process that can stretch over a period of time. Another point is that social security coordination rules should guard against the abuse of benefits. This is a noble goal: “But one should not make regulations only with an eye to the cases of abuse that may appear. Whatever rules one creates, abuse will always be possible. Because of the fear of abuse the right to free movement is denied to a category of citizens who have worked and paid contributions like everyone else, and who, if anything, have a greater need for mobility within the common market than those who are in employment.”⁹⁸² Furthermore, it should be noted that Regulation 883/2004 will not come

⁹⁸² Viaene J *et al* “Prevention and related policy issues” in Berghman J and Cantillon B (eds) *The European Face of Social Security* (Avebury (1993)) 281 at 316.

into force until an implementing Regulation has been adopted. A proposal for the aforesaid implementing Regulation is expected to be presented at the end of 2006.⁹⁸³

In conclusion, SADC could learn from the EU's social security coordination framework. It is clear that social security coordination in the EU is mainly geared at the facilitation of the free movement of persons (particularly workers). Regional integration and the facilitation of the free of movement of persons as well as workers are some of the aims of SADC. To this end, SADC should develop its regional integration and freedom of movement policies in tandem with social security coordination policies. This is important for the reason that it would be self-defeating to grant freedom of movement in a social security coordination vacuum. Individuals would be reluctant to take advantage of the freedom of movement if that was likely to compromise their social security rights.

3.3. Employment protection

There is a variety of provisions enshrined in several EU instruments which are aimed at employment protection. These provisions embrace typical employment protection or employment protection-related rights and freedoms, such as freedom of expression and information,⁹⁸⁴ freedom of assembly and of association,⁹⁸⁵ freedom to choose an occupation and the right to engage in work,⁹⁸⁶ and protection in the event of an unjustified dismissal.⁹⁸⁷

⁹⁸³ Towards an improved coordination of social security systems" – accessed at <http://europa.eu.int/scadplus/en/cha/c10521.htm>.

⁹⁸⁴ See, for example, articles 11(1) and 27 of the *Charter of Fundamental Rights of the European Union*, article 2 of the Council Directive 98/59/EC of 20 July 1998 on the Approximation of the Laws of the Member States Relating to Collective Redundancies and article 7 of the Council Directive 2001/23/EC of 12 March 2001 on the *Approximation of the Laws of the Member States Relating to the Safeguarding of Employees' Rights in the event of Transfers of Undertakings, Businesses or Parts of Undertakings or Businesses*. Also see, generally, Colucci M "The European Social Charter and the right to information and consultation of workers. Its implementation in the European Union and in Italy" in Blanpain R (eds) *The Council of Europe and the Challenges of the XXIst Century* (Kluwer (2001)) 87.

⁹⁸⁵ Article 12 of the *Charter of Fundamental Rights in the European Union*. See Ryan B "The Charter and collective labour law" in Hervey TK and Kenner J (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Oxford (2003)) 67 at 69-72 and Bercusson B "Freedom of assembly and of association" in Bercusson B (ed) *European Labour Law and the EU Charter of Fundamental Rights – Summary Version* (European Trade Union Institute (2002)) 25.

⁹⁸⁶ Article 15. See Vigneau C "Freedom to choose an occupation and right to engage in work" in Bercusson B (ed) *European Labour Law and the EU Charter of Fundamental Rights – Summary Version* (European Trade Union Institute (2002)) 29.

⁹⁸⁷ See paragraph 3.5.3. in chapter 4.

The following paragraphs will examine a selection of employment protection rights as found in the EU.

3.3.1. Equality and non-discrimination

Article 23 of the *Charter of Fundamental Rights of the European Union* makes provision for equality between men and women.⁹⁸⁸ Nonetheless, it does “not prevent the maintenance or adoption of measures providing for specific advantages in favour of under-represented sex.” This provision draws its inspiration from articles 2, 3(3) and 141 of the *Treaty establishing the European Community (Consolidated)*. What is notable though is that it has been drafted in a gender neutral language. Apart from article 23, the *Charter of Fundamental Rights of the European Union*, proscribes any discrimination on the basis of, among others, sex, race, colour, ethnic or social origin, language, religion or belief, disability, age and sexual orientation.⁹⁸⁹ It provides further that “with the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties any discrimination on grounds of nationality shall be prohibited.”⁹⁹⁰

3.3.2. Information and consultation

Article 27 of the *Charter of Fundamental Rights of the European Union* requires that workers or their representatives be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community and national laws and practices. The Council Directive 98/59/EC of 20 July 1998 on the *Approximation of the Laws of the Member States Relating to Collective Redundancies* makes provision for additional

⁹⁸⁸ See Costello C “Gender equalities and the Charter of Fundamental Rights of the European Union” in Hervey TK and Kenner J (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Oxford (2003)) 111.

⁹⁸⁹ Article 21 of the *Charter of Fundamental Rights of the European Union*. See Bell M “The right to equality and non-discrimination” in Hervey TK and Kenner J (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Oxford (2003)) 91.

⁹⁹⁰ Article 21(2) of the *Charter of Fundamental Rights of the European Union*.

measures to protect employees during redundancies.⁹⁹¹ These measures include, among others, the following: consultation with workers' representatives,⁹⁹² disclosure of information,⁹⁹³ and procedure for collective redundancies.⁹⁹⁴ It should be borne in mind that this Directive does not apply to: collective redundancies affected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry or the completion of such contracts; and workers employed by public administrative bodies or by establishments governed by public

⁹⁹¹ Article 1(1)(a) of the Council Directive 98/59/EC of 20 July 1998 on the *Approximation of the Laws of the Member States Relating to Collective Redundancies* defines 'collective redundancies' as "dismissals by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is: (i) either, over a period of 30 days at least 10 in establishments normally employing more than 20 and less than 100 workers, at least 10 percent of the number of workers in establishments normally employing at least 100 but less than 300 workers, at least 30 in establishments normally employing 300 workers or more, (ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishment in question."

⁹⁹² The Council Directive 98/59/EC of 20 July 1998 on the *Approximation of the Laws of the Member States Relating to Collective Redundancies* (Council Directive 98/59/EC) imposes a duty on employers contemplating collective redundancies to consult with workers' representatives (article 2(1)). Such consultations must, in accordance with the Council Directive 98/59/EC, commence in good time with a view of reaching an agreement (article 2(1)). The aforementioned consultations shall cover the following issues: ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, *inter alia*, at aid for redeployment or retraining workers made redundant (article 2(2)).

⁹⁹³ So as to enable workers' representatives to make constructive proposals, the Council Directive 98/59/EC of 20 July 1998 requires employers, in good time during the course of the consultations to supply the workers' representatives with all relevant information (article 2(3)). Employers are also required to notify the workers' representatives in writing about: the reasons for the projected redundancies; the number and categories of workers to be made redundant; the number and categories of workers normally employed; the period over which the projected redundancies are to be effected; the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power thereof upon the employer; and the method for calculating any redundancy payment other than those arising out of national laws and/or practice (article 2(3)). Employers are required to furnish the competent authority with a copy of, at least, the first five of the aforementioned issues which should be forwarded in writing to the workers' representatives (article 2(3)).

⁹⁹⁴ Employers have, in accordance with the Council Directive 98/59/EC of 20 July 1998, a duty to notify a competent authority in writing about any projected collective redundancies (article 3(1)). The aforesaid notification shall comprise of all relevant information concerning the intended redundancies, the consultations with workers' representatives, the number of workers to be made redundant, the number of workers normally employed and the period over which the redundancies are to be effected (article 3(1)). Employers are, in addition to the foregoing, required to furnish the workers' representatives with a copy of the notification which they have forwarded to the competent authority (article 3(2)). The idea is to provide workers' representatives with an opportunity to send any comments, should there be any, to the competent public authority (article 3(2)). The Council Directive 98/59/EC of 20 July 1998 provides, in addition to requiring employers to notify the competent public authority about the intended collective dismissals, that projected collective dismissals notified to the competent public authority shall take effect not earlier than 30 days after the aforesaid notification (article 4(1)). Member states have, however, the discretion to grant the competent public authority the power to reduce the 30 day period (article 4(1)). This 30 day period is aimed at providing the competent authority with an opportunity to seek solutions to the problems raised by the projected collective redundancies (article 4(2)).

law and the crews of seagoing vessels.⁹⁹⁵ Furthermore, the Directive does not affect the right of member states to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to promote or to allow the application of collective agreements more favourable to employees.⁹⁹⁶

3.3.3. Protection against unjustified dismissal

The *Charter of Fundamental Rights of the European Union* provides every worker with the right to protection against unjustified dismissal, in accordance with Community law and national law and practices.⁹⁹⁷ This provision draws inspiration from the ILO's Recommendation 166 and Convention 158 on *Termination of Employment*.⁹⁹⁸ In addition, it provides every person with the right to protection from dismissal for a reason connected with maternity.⁹⁹⁹ National laws of a majority of member states proscribe unfair termination of employment. They accordingly recognise three valid grounds (i.e. capacity to do the work, conduct and the economic reasons of the employer) upon which an employee may be dismissed from his or her employment. On the other hand, article 4(1) of the Council Directive 2001/23/EC of 12 March 2001 on the *Approximation of the Laws of the Member States relating to the Safeguarding of Employees' Rights in the event of Transfers of Undertakings, Businesses or Parts of Undertakings or Businesses* permits member states to exclude certain specific categories of workers from protection against dismissal.

3.3.4 Some observations

What is notable from the preceding discussion is that most of the provisions dealing with employment protection are contained in the *Charter of Fundamental Rights of the European*

⁹⁹⁵ Article 2 of the Council Directive 98/59/EC of 20 July 1998 on the *Approximation of the Laws of the Member States Relating to Collective Redundancies*.

⁹⁹⁶ Article 5.

⁹⁹⁷ Article 30 of the *Charter of Fundamental Rights of the European Union*.

⁹⁹⁸ Bruun N "Protection in the event of unjustified dismissal" in Bercusson B (ed) *European Labour Law and the EU Charter of Fundamental Rights – Summary Version* (European Trade Union Institute (2002)) 63 at 63.

⁹⁹⁹ Article 33(2). See article 10 of the Council Directive 92/85/EEC of 19 October 1992 on the *Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers who have recently given Birth or are Breastfeeding* (Tenth Individual Directive within the Meaning of article 16(1) of Directive 89/391/EEC).

Union. The shortcoming of this situation is that, as pointed out earlier in this study, this instrument has only a declaratory status. This means it is not part of the EU's hard law. Some commentators have commented on the legal effects of the *Charter of Fundamental Rights of the European Union* if incorporated into the *Treaty establishing the European Community (Consolidated)*.¹⁰⁰⁰ One of the legal consequences of such a step would be that "social rights guaranteed by the [*Treaty establishing the European Community (Consolidated)*] would put pressure on the Commission to make proposals for their implementation."¹⁰⁰¹ Another issue to be noted is that the *Charter of Fundamental Rights of the European Union* lacks a chapter on monitoring. The problem with the absence of such a chapter is that: "In particular in the area of fundamental social rights, where goals and principles are playing a dominant role, judicial control will only have a very limited effect. Therefore a machinery of monitoring has to be established."¹⁰⁰²

3.4. Other aspects fundamental to unemployment protection in the European Union

The EU, through its instruments, embraces a variety of features which are essential in unemployment protection endeavours. These features, which may be distilled from instruments such as the *Treaty establishing the European Community*, the *Charter of Fundamental Rights of the European Union* and the *Guidelines for the Employment Policies of the Member States* (the Employment Guidelines) include, among others, the creation of productive employment, (re)integration of vulnerable groups of persons, and a partnership approach.

¹⁰⁰⁰ See Bercusson B *et al* "Legal prospects and legal effects of the EU Charter" in Bercusson B (ed) *European Labour Law and the EU Charter of Fundamental Rights – Summary Version* (European Trade Union Institute (2002)) 13 at 13-14.

¹⁰⁰¹ *Ibid.*

¹⁰⁰² Weiss M "Perspectives for European labour law and industrial relations" in Biagi M (ed) *Towards a European Model of Industrial relations?* (Kluwer (2001)) 97 at 100.

3.4.1. Creation of productive employment

In as far as the creation of employment is concerned, the *Treaty establishing the European Community (Consolidated)*¹⁰⁰³ lists the following issues as the objectives of the Community and the member states: the *promotion of employment, improved living and working conditions*, so as to make possible their *harmonisation* while the *improvement* is maintained, *proper social protection, dialogue between management and labour, the development of human resources* with a view to lasting *high employment* and the *combating of exclusion*.¹⁰⁰⁴ This has prompted some commentators to conclude that ‘very high standards’ have been set for the EU and the Community in as far as employment and social policy is concerned.¹⁰⁰⁵ To achieve these objectives, the *Treaty establishing the European Community (Consolidated)* directs the Community to support the activities of the member states in, among others, the following fields: *social security and social protection of workers*;¹⁰⁰⁶ *the combating of social exclusion*;¹⁰⁰⁷ and the *modernisation of social protection systems*.¹⁰⁰⁸ In addition, the Employment Title (as pointed out earlier) requires member states as well as the Community to work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change.¹⁰⁰⁹ It also obliges the Community to contribute to a high level of employment by encouraging cooperation between member states and by supporting and, if necessary, complementing their action.¹⁰¹⁰ The *Guidelines for the Employment Policies of the Member States* (of 1998, 2002 and 2003), which are envisaged by article 128(2) of the *Treaty establishing the European Community (Consolidated)*, require member states to develop entrepreneurship.¹⁰¹¹

¹⁰⁰³ *Official Journal of the European Communities* C325/33, 24 December 2002 – accessed at http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/pdf/12002E_EN.pdf.

¹⁰⁰⁴ Article 136 of the *Treaty establishing the European Community*.

¹⁰⁰⁵ See Blanpain R “The European Union, employment, social policy and the law” in Blanpain R (ed) *Institutional Changes and European Social Policies after the Treaty of Amsterdam* (Kluwer (1998)) 1 at 20.

¹⁰⁰⁶ Article 137(1)(c).

¹⁰⁰⁷ Article 137(1)(j).

¹⁰⁰⁸ Article 137(1)(k).

¹⁰⁰⁹ Article 125 of the *Treaty establishing the European Community (Consolidated)*.

¹⁰¹⁰ Article 127 of the *Treaty establishing the European Community (Consolidated)*.

¹⁰¹¹ The 1998 Employment Guidelines (the 1998 Employment Guidelines Council Resolution of 15 December 1997 – accessed at <http://europa.eu.int>) require member states to develop entrepreneurship by making it easier to start up and run businesses, exploiting the opportunities for job creation and making the taxation system more

3.4.2. (Re)integration of vulnerable groups of persons

As regards the (re)integration of vulnerable groups (such as people with disabilities, unemployed youth, immigrants and ethnic minorities) the *Charter of Fundamental Rights of the European Union* makes provision for the integration of persons with disabilities by stating that: “the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.”¹⁰¹² However, it should be pointed out that this instrument is a mere political declaration.¹⁰¹³ The (re)integration of the vulnerable groups is also envisaged by the Employment Guidelines.¹⁰¹⁴

employment friendly. Guideline 10 in the Employment Guidelines for 2002 Annexed to Council Decision of 18 February 2002 on Guidelines for Member States’ Employment Policies for the Year 2002 requires member states to develop entrepreneurship and job creation by making it easier to start and run businesses and removing barriers to the provision of services and developing framework conditions to exploit fully the employment potential of the full range of the services sector to create more and better jobs. Furthermore, Guideline 2 of the 2003 Employment Guidelines is dedicated to job creation and entrepreneurship. In accordance with this Guideline member states are to encourage the creation of more and better jobs by fostering entrepreneurship, innovation, investment capacity and a favourable business environment for all enterprises.

¹⁰¹² Article 26 of the *Charter of Fundamental Rights of the European Union*.

¹⁰¹³ Weiss M “Perspectives for European labour law and industrial relations” in Biagi M (ed) *Towards a European Model of Industrial Relations?* (Kluwer (2001)) 97 at 98.

¹⁰¹⁴ For instance, the 1998 Employment Guidelines require member states to improve employability by, among others, tackling youth unemployment and preventing long-term unemployment (the approaches implemented by member states are required to include measures aimed at promoting the re-employment of the long-term unemployed), transition from passive measures to active measures, and easing the transition from school to work. Furthermore, member states are to strengthen the policies for equal opportunities by tackling gaps in unemployment rates between women and men, reconciling work and family life and facilitating return to work by giving specific attention to women and men considering a return to paid work after an absence. In addition, they requires member states to promote the integration of people with disabilities into working life by paying special attention to the problems people with disabilities may encounter in participating in working life. The 2002 Employment Guideline, in pursuit of the goal to improve employability require – member states to, *inter alia*, tackle youth unemployment and prevent long-term unemployment; adopt a more employment-friendly approach – particularly as regards benefits, taxes and training systems; develop a policy for active ageing; develop skills for the new labour market in the context of lifelong learning; and combat discrimination and promote social inclusion through access to employment. These Employment Guidelines, in addition to the foregoing, require member states to strengthen equal opportunities policies for women and men by, among others, reconciling work and family life. As a result, they direct member states and social partners to design, implement and promote family-friendly policies, including affordable, accessible and high-quality care services for children and other dependants, as well as parental and other leave schemes; consider setting a national target, in accordance with their national situation, for increasing the availability of care services for children and other dependants; and give specific attention to women, and men, considering a return to the paid workforce after an absence and, to that end, they will examine the means of gradually eliminating the obstacles to such return (Guideline 18 in the Employment Guidelines for 2002 Annexed to Council Decision of 18 February 2002 on Guidelines for Member States’ Employment Policies for the Year 2002). In addition, Guideline 7 in the Employment Guidelines Annexed to Council Decision of 22 July 2003 on Guidelines for the Employment

3.4.3. Partnership approach

Concerning the partnership approach, the 1998 Employment Guidelines required member states to encourage a partnership approach. They accordingly urged member states' social partners at their various levels of responsibility and action to conclude agreements with a view to increasing the possibilities for training, work experience, traineeship or other measures likely to promote employability.¹⁰¹⁵ In addition, they require member states and social partners to endeavour to develop possibilities for life long learning.¹⁰¹⁶

3.4.4. Some observations

As is apparent from the preceding discussion, the EU instruments envision a situation whereby member states strive towards the creation of productive employment and the (re)integration of the persons who (may) experience difficulties in accessing the labour market. In addition, social partners are required to work in partnership in their quest to promote employability. One of the core characteristics of the EU social policy instruments is that unemployment protection schemes should be supported by active labour market policies. Even so, there are several points which deserve special mention. Firstly, provisions contained in the *Treaty establishing the European Community (Consolidated)*, such as those in the Employment Title, oblige member states as well as the Community to strive towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change. This overlooks the fact that "the EC has no general regulatory competence whatsoever that might

Policies of the Member States requires member states to *promote the integration* of, and *combat the discrimination* against, people at a disadvantage in the labour market. People at a disadvantage in the labour market, as is apparent from Guideline 7, are those people facing particular difficulties on the labour market, such as *early school leavers, low-skilled workers, people with disabilities, immigrants* and the *ethnic minorities*. Member states are specifically requested by Guideline 7 to develop the employability of these categories of persons by *increasing job opportunities* and *preventing all forms of discrimination* against them.

¹⁰¹⁵ The 1998 Employment Guidelines Council Resolution of 15 December 1997 – accessed at <http://europa.eu.int>.

¹⁰¹⁶ *Ibid.*

lead to a genuine centrally coordinated European employment policy.”¹⁰¹⁷ Furthermore, the Employment Guidelines comprise in the main of vague and weak concepts (such as employability, flexibility and partnership).¹⁰¹⁸ The disadvantage of these ambiguous concepts is that they “can be interpreted in various ways, making it easy for member states to simply continue their existing policies.”¹⁰¹⁹ Nevertheless, the fact that the concepts used are vague should not be construed only in negative terms. There is a positive side to this and that is that “it makes it easier to adapt [the Employment Guidelines] to different national labour markets.”¹⁰²⁰ Another point, which has been highlighted earlier, is that the Employment Guidelines are non-binding. Failure to comply with the Employment Guidelines by a member state does not attract any real penalties. As regards the provision contained in the *Charter of Fundamental Rights of the European Union* which envisions the integration of persons with disabilities, it should be reiterated that this instrument is only a political declaration.

4. COUNCIL OF EUROPE

4.1. Introduction

4.1.1. Aims and purpose of the Council of Europe

The Council of Europe (the Council) was founded in 1949.¹⁰²¹ It consequently earned the title of being the continent’s oldest political organisation.¹⁰²² Membership to the Council is

¹⁰¹⁷ Blanpain R “The European Union, employment, social policy and the law” in Blanpain R (ed) *Institutional Changes and European Social Policies after the Treaty of Amsterdam* (Kluwer (1998)) 1 at 29.

¹⁰¹⁸ Crespo E and Pascual AS “The EU’s concept of activation for young people: Towards a new social contract?” in Pascual AS (ed) *Are Activation Policies Converging in Europe?: The European Employment Strategy for Young People* (European Trade Union Institute (2003)) 13 at 17 and Blanpain R “The European Union, employment, social policy and the law” in Blanpain R (ed) *Institutional Changes and European Social Policies after the Treaty of Amsterdam* (Kluwer (1998)) 1 at 24.

¹⁰¹⁹ Crespo E and Pascual AS “The EU’s concept of activation for young people: Towards a new social contract?” in Pascual AS (ed) *Are Activation Policies Converging in Europe?: The European Employment Strategy for Young People* (European Trade Union Institute (2003)) 13 at 17.

¹⁰²⁰ *Ibid* 18.

¹⁰²¹ Council of Europe “About the Council of Europe” – accessed at http://www.coe.int/T/e/Com/about_coe/. The Council of Europe was established subsequent to a speech by Winston Churchill at the University of Zurich (19 September 1946) in which he called upon European countries to found a “United States of Europe”. A text of this speech may be accessed at <http://www.peshawar.ch/varia/winstin.htm>.

open to all European states. Even so, the European states seeking membership must accept the principle of the rule of law and guarantee fundamental human rights and freedoms to their citizens. The Council comprises of forty-six (46) countries.¹⁰²³ The aim of the Council is, in accordance with the *Statute of the Council of Europe*, to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.¹⁰²⁴ The organs of the Council¹⁰²⁵ are entrusted with the task of pursuing the aim of the Council.¹⁰²⁶ According to the *Statute of the Council of Europe* the organs of the Council shall pursue the aim of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.¹⁰²⁷ The Council and the European Union are two distinct organisations. For instance, the Council has 46 member states whereas the European Union has 25 member states. Furthermore, the Council is only an intergovernmental organisation and its treaties are not directly binding in national law save those ratified by the normal parliamentary procedures of the member state concerned.¹⁰²⁸ The European Union is, on the other hand, a supranational organisation whose legislation is directly binding on national law.

¹⁰²² Council of Europe “About the Council of Europe” – accessed at http://www.coe.int/T/e/Com/about_coe/.

¹⁰²³ These countries are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marina, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, “The former Yugoslav Republic of Macedonia”, Turkey, Ukraine and United Kingdom. Apart from the foregoing, there is one candidate state for membership, namely Belarus; five states, namely Canada, Holy See, Japan, Mexico and the United States of America, which are observers to the Committee of Ministers; and three states, i.e. Canada, Israel and Mexico, which serve as the National Parliaments Observers to the Parliamentary Assembly (Council of Europe “The Council of Europe’s Member States” – accessed at http://www.coe.int/T/e/com/about_coe/members_states/default.asp).

¹⁰²⁴ Article 1(a) of the *Statute of the Council of Europe*.

¹⁰²⁵ Organs of the Council are the Committee of Ministers (Article 10(i) and Chapter 13 of the *Statute of Council of Europe*) and the Parliamentary Assembly (Article 10(ii) and Chapter V of the *Statute of the Council of Europe*). The Committee of Ministers and the Consultative Assembly are served by the secretariat of the Council (Article 10 of the *Statute of the Council of Europe*).

¹⁰²⁶ Article 1(b).

¹⁰²⁷ *Ibid.* It should be noted, however, that matters relating to national defence do not fall within the scope of the Council (article 1(d) of the *Statute of the Council of Europe*).

¹⁰²⁸ Council of Europe “Council of Europe and European Union” – accessed at <http://www.coe.int>.

4.1.2. Nature and form of Council of Europe's social security standards

The legal instruments of the Council may be divided into two categories: that is standard setting legal instruments and coordinating legal instruments. The *European Code of Social Security*,¹⁰²⁹ the *Protocol to the European Code of Social Security*,¹⁰³⁰ and the *European Code of Social Security (Revised)*¹⁰³¹ can be classified as standard setting instruments. Alongside these instruments there are the *European Social Charter*¹⁰³² and the *European Social Charter (Revised)*.¹⁰³³ It should be noted that the *European Code of Social Security* is based on the ILO *Social Security (Minimum Standards) Convention*. Thus its standards are similar to those contained in the aforesaid Convention. The *Protocol to the European Code of Social Security* contains, in comparison with the *European Code of Social Security* and the *Social Security (Minimum Standards) Convention*, higher standards. The *European Code of Social Security* and its Protocol and the *European Code of Social Security (Revised)* provide social security minimum standards in branches of social security which include, among others, unemployment benefits. The *European Code of Social Security (Revised)* was introduced after the *European Code of Social Security* has been criticised for not being flexible enough.¹⁰³⁴ This instrument is not yet in force.¹⁰³⁵ Coordinating legal instruments,¹⁰³⁶ on the other hand, comprise the *European Interim Agreement on Social Security Schemes relating to Old Age, Invalidity and Survivors*,¹⁰³⁷ the *European Interim Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors*,¹⁰³⁸ the *European*

¹⁰²⁹ *European Treaty Series* No. 48 of 1964.

¹⁰³⁰ *Ibid.*

¹⁰³¹ *European Treaty Series* No. 139 of 1990.

¹⁰³² *European Treaty Series* No. 35 of 1961.

¹⁰³³ *European Treaty Series* No. 163 of 1996.

¹⁰³⁴ Pennings F and Schulte B "International social security standards: An overview" in Pennings F (ed) *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer (2006)) 1 at 23.

¹⁰³⁵ *Ibid.*

¹⁰³⁶ Coordinating instruments have the following characteristics: "Co-ordinating instrument do not change the substance of the national social security system, they do not change the amount of benefit or the condition of entitlement. They ensure that migrants are treated fairly. Where social security is a creature of national law, co-ordination is a creature of international law and relies heavily upon co-operation between states" (Nickless J and Siedl H *Co-ordination of Social Security in the Council of Europe: Short Guide* (Council of Europe Publishing (2004)) 11).

¹⁰³⁷ *European Treaty Series* No. 12 of 1953.

¹⁰³⁸ *European Treaty Series* No. 13 of 1953.

*Convention on Social Security*¹⁰³⁹ and its Protocol, and (to a certain extent) the *European Convention on Social and Medical Assistance*.¹⁰⁴⁰

All contracting parties have an obligation to observe the minimum standards and are also encouraged to exceed them. It should be mentioned that the *European Social Charter (Revised)* (ESCR)¹⁰⁴¹ and the *European Code of Social Security* are the two most important social security legal instruments of the Council.¹⁰⁴² Article 12 of the ESCR directs the Contracting parties to undertake to maintain the social security system at a satisfactory level (at least equal to that necessary for the ratification of the *European Code of Social Security*), endeavour to raise progressively the system of social security to a higher level and take steps to ensure equal treatment with their own nationals and the nationals of other Parties in respect of social security rights. The ESCR is hailed as one of those legal instruments which are “more suited to current social needs than the legal instruments of the ILO.”¹⁰⁴³ Nevertheless, there is a reason for this situation and that is:

“...the Council of Europe Member States are economically and socially more advanced than those of the ILO and are thus able to take on stricter and tighter duties. In addition it is relevant to note that the mandate of the Council of Europe differs from that binding the ILO. As a result the Council can make standards on issues like the right to housing which are beyond the ILOs mandate.”¹⁰⁴⁴

In addition to the right to social security, the ESCR makes provision for a variety of issues fundamental to unemployment protection. These issues include, among others, the following: the achievement and maintenance of as high and stable a level of employment as possible;¹⁰⁴⁵ the establishment or maintenance of free employment services for all workers;¹⁰⁴⁶ vocational

¹⁰³⁹ *European Treaty Series* No. 78 of 1972.

¹⁰⁴⁰ *European Treaty Series* No. 14 of 1953.

¹⁰⁴¹ Reference is made here to the *European Social Charter (Revised)* and the *European Social Charter* for the reason that the *European Social Charter (Revised)* embodies all rights guaranteed under the 1961 Charter, its additional protocol and adds new rights and amendments.

¹⁰⁴² Council of Europe (Secretariat) “European Social Charter (1961) / Revised Charter (1996) and supervisory machinery” – accessed at <http://www.coe.int>.

¹⁰⁴³ Pennings F and Schulte B “International social security standards: An overview” in Pennings F (ed) *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer (2006)) 1 at 24.

¹⁰⁴⁴ *Ibid.*

¹⁰⁴⁵ Article 1(1) of the *European Social Charter* and the *European Social Charter (Revised)*.

¹⁰⁴⁶ Article 1(3) of the *European Social Charter* and the *European Social Charter (Revised)*.

guidance,¹⁰⁴⁷ training,¹⁰⁴⁸ retraining and rehabilitation;¹⁰⁴⁹ and social integration of persons with disabilities.¹⁰⁵⁰

4.1.3. Supervision of social security standards within the Council of Europe structures

4.1.3.1. European Social Charter

(a) National reports

The supervision of the implementation of the *European Social Charter* is largely premised on the submission of national reports by the contracting parties.¹⁰⁵¹ Two types of reports are identifiable, namely: *reports on accepted provisions* and *reports on unaccepted provisions*. Contracting parties are required to submit reports at two-yearly intervals on the implementation of the provisions of the *European Social Charter* they have accepted.¹⁰⁵² In addition, The *European Social Charter* requires contracting parties to submit reports “at appropriate intervals” as requested by the Committee of Ministers on the provisions of Part II of the *European Social Charter* which they did not accept.¹⁰⁵³ This requirement is analogous to that contained in article 19(5)(e) of the ILO Constitution requiring member states to submit reports on Conventions they have not accepted. The advantage of this provision is that it reminds member states of “the existence and need for ratification of the conventions concerned and [points the] difficulties standing in the way of acceptance that [may] be taken into account in the revision of convention texts and in the drafting on new conventions in the same area.”¹⁰⁵⁴ The *European Social Charter* makes provision for modest involvement of the interested stakeholder such as employers and trade unions in the supervisory process. Article 23 of the *European Social Charter* requires contracting parties to communicate copies of

¹⁰⁴⁷ Article 9 of the *European Social Charter* and the *European Social Charter (Revised)*.

¹⁰⁴⁸ Article 10 of the *European Social Charter* and the *European Social Charter (Revised)*.

¹⁰⁴⁹ Article 20(b) of the *European Social Charter (Revised)*.

¹⁰⁵⁰ Article 15(1) and (2) of the *European Social Charter* and the *European Social Charter (Revised)*.

¹⁰⁵¹ Part IV of the *European Social Charter*. The *European Social Charter (Revised)* is subject to the same supervision as the *European Social Charter* (Article C of Part IV of the *European Social Charter (Revised)*).

¹⁰⁵² Article 21 of the *European Social Charter*.

¹⁰⁵³ Article 22 of the *European Social Charter*.

¹⁰⁵⁴ Harris D *The European Social Charter* (University Press of Virginia (1984)) 213.

their reports on accepted and non-accepted provisions to the their national employers and trade union organisations. It also obliges them to forward any comments on the aforesaid reports by the abovementioned national organisations to the Secretary General. These comments are taken into account when the reports are examined. One point of criticism that can be levelled against article 23 is that it neglected to make “provision for the participation of social rights non-governmental organisations.”¹⁰⁵⁵ This criticism should be understood from the perspective that the Secretary General is required “to forward a copy of the reports of the contracting parties to the international non-governmental organisations which have consultative status with the Council of Europe and have particular competence in the matters governed by the present Charter.”¹⁰⁵⁶ It neglected to make provision for national non-governmental organisations. This is unfortunate because these organisations normally “have more direct information on and interest in the national situation than such international organisations as may exist.”¹⁰⁵⁷

(b) European Committee of Social Rights

The European Committee of Social Rights, formerly known as the Committee of Independent Experts for the European Social Charter (the Committee of Experts), is one of the supervisory bodies of the Council of Europe. This is the first supervisory body which examines the national reports. It comprises of “independent experts of the highest integrity and of recognised competence in international social questions.”¹⁰⁵⁸ The Committee of Experts is required to invite the ILO to nominate a representative to participate in a consultative capacity in the deliberations of the Committee of Experts. After examining the national reports the Committee of Experts adopts conclusions on the conformity of national laws and practices with the *European Social Charter*. It should be borne in mind that the

¹⁰⁵⁵ Gomien D *et al* *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing (1996)) 418.

¹⁰⁵⁶ Article 23 of the *European Social Charter* (as amended).

¹⁰⁵⁷ Gomien D *et al* *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing (1996)) 418.

¹⁰⁵⁸ Article 25(1) of the *European Social Charter*.

Committee of Experts “makes the legal rulings, and its findings of [European Social] Charter violations cannot be challenged.”¹⁰⁵⁹

(c) Governmental Social Committee of the Council of Europe

The adoption of conclusions by the Committee of Experts does not conclude the supervisory process. This is the first step of the supervisory process. The reports of the contracting parties and the conclusions of the Committee of Experts are submitted for examination by a second supervisory body, namely the Governmental Social Committee of the Council of Europe (the Governmental Committee).¹⁰⁶⁰ The task of this Committee used to be described only cryptically in the *European Social Charter*.¹⁰⁶¹ Consequently, there has been some confusion as to the roles of the Committee of Experts and that of the Government Committee.¹⁰⁶² The problem stemmed from the fact the two organs claimed the same competence and made use of it differently: “For example, in the...first part of the 11th supervisory cycle, whereas the Committee of Independent Experts found 46 breaches of their obligations by the seven reporting parties, the Governmental Committee found only ten.”¹⁰⁶³ In addition, the relationship between the two supervisory organs has not always been harmonious.¹⁰⁶⁴ This situation has since been clarified. According to the amended article 27(3) of the *European Social Charter*:

“The Governmental Committee shall prepare the decisions of the Committee of Ministers. In particular, in the light of reports of the Committee of Independent Experts and of the Contracting

¹⁰⁵⁹ Brillat R “The Supervisory machinery of the European Social Charter: Recent developments and their impact” in De Búrca G and De Witte B (eds) *Social Rights in Europe* (Oxford University Press (2005)) 31 at 32.

¹⁰⁶⁰ Article 27(1) of the *European Social Charter*. The Governmental Committee comprises of one of each of the contracting parties, no more than two international organisations of employers and no more than two international trade organisations. It has the discretion to consult no more than two representatives of international non-governmental organisations having consultative status with the Council of Europe (article 27(2) of *European Social Charter*).

¹⁰⁶¹ See Harris D *The European Social Charter* (University Press of Virginia (1984)) 239-245 and Gomien D *et al Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing (1996)) 421-422.

¹⁰⁶² Harris DJ “A fresh impetus for the European Social Charter” (1992) 41 *International and Comparative Law Quarterly* 659 at 652.

¹⁰⁶³ Harris DJ “A fresh impetus for the European Social Charter” (1992) 41 *International and Comparative Law Quarterly* 659 at 652.

¹⁰⁶⁴ See Harris D *The European Social Charter* (University Press of Virginia (1984)) 245-249.

Parties, it shall select, giving reasons for its choice, on the basis of social, economic and other policy considerations the situations which should, in its view, be the subject of recommendations to each Contracting Party concerned, in accordance with Article 28 of the [European Social] Charter. It shall present to the Committee of Ministers a report which shall be made public.”

Therefore, the Governmental Committee’s function is to make sure that member states comply with the conclusions of the Committee of Experts.¹⁰⁶⁵ The Governmental Committee can, in a of case protracted failure by a member state to comply with conclusions, “request the Committee of Ministers to issue a recommendation to the member state concerned, calling on it to bring the situation into conformity.”¹⁰⁶⁶ The system of Governmental Committee’s recommendations is at times objectionable. For example, there have been situations which merited the Governmental Committee’s recommendations but none was issued.¹⁰⁶⁷ Furthermore, the wisdom of having the Governmental Committee or the Committee of Ministers as part of the supervisory machinery of the *European Social Charter* is questioned in some quarters.¹⁰⁶⁸ It is argued that it is unacceptable that a body comprising of government representatives “should play any part in the supervisory process if ‘justice is to be seen to be done’ by those whose human rights are in issue.”¹⁰⁶⁹

(d) Parliamentary Assembly

The conclusions of the Committee of Experts are also transmitted to the Parliamentary Assembly (previously known as the Consultative Assembly).¹⁰⁷⁰ The Parliamentary Assembly comprise largely of representative of each member state of the Council of Europe.

¹⁰⁶⁵ Brillat R “The Supervisory machinery of the European Social Charter: Recent developments and their impact” in De Búrca G and De Witte B (eds) *Social Rights in Europe* (Oxford University Press (2005)) 31 at 33.

¹⁰⁶⁶ *Ibid.*

¹⁰⁶⁷ See Churchill RR and Khaliq U “The collective complaints system of the European Social Charter: An effective mechanism for ensuring compliance with economic and social rights?” (2004) 15 *European Journal of International Law* 417 and Gomien D *et al Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing (1996)) 423.

¹⁰⁶⁸ See Gomien D *et al Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing (1996)) 425 and Harris DJ “A fresh impetus for the European Social Charter” (1992) 41 *International and Comparative Law Quarterly* 659.

¹⁰⁶⁹ Gomien D *et al Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing (1996)) 423-424.

¹⁰⁷⁰ Article 28 of the *European Social Charter*.

The function of this body is to express its views on the conclusions of the Committee of Experts to the Committee of Ministers. These views have no binding effect on the Committee of Ministers and it is said that they have been disregarded by the latter.¹⁰⁷¹ Pursuant to a suggestion by the Parliamentary Assembly, (the previous) article 28 of the *European Social Charter* has been replaced by a new provision (i.e. the current article 29). The effect of this change is that the Parliamentary Assembly has been excluded from the formal supervisory process. This is to be welcomed for the reason that the Parliamentary Assembly's opinions "had little noticeable impact and [its] participation lengthened by some months the time taken to complete an unduly cumbersome system of supervision."¹⁰⁷² Furthermore, the fact that the Parliamentary Assembly comprised largely of national members of Parliament rendered it unqualified to examine compliance with a legal text.¹⁰⁷³ The new role of the Parliamentary Assembly is to "conduct debates on matters of social policy in the light of documents generated by each cycle of implementation, but no longer take part in the supervisory process."¹⁰⁷⁴

(e) Committee of Ministers

The Committee of Ministers is one of the most important bodies in the supervisory machinery of the *European Social Charter*. The function of the Committee of Ministers is to issue recommendations to member states on their compliance with the *European Social Charter* based on the Committee of Experts' conclusions and the Governmental Committee's report. This is intended as the end stage of the supervisory process in each reporting cycle. Nevertheless, as indicated earlier, this did not function well in the past. The new article 28 of the (amended) *European Social Charter*, which substitutes the present article 29, requires the Committee of Ministers to "adopt, by a majority of two thirds of those voting...a resolution covering the entire supervision cycle and containing individual recommendations to the Contracting Parties concerned." Some positive developments on the operations of the

¹⁰⁷¹ Betten L *International Labour Law: Selected Issues* (Kluwer (1993)) 422.

¹⁰⁷² Gomien D *et al Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing (1996)) 424.

¹⁰⁷³ Harris DJ "A fresh impetus for the European Social Charter" (1992) 41 *International and Comparative Law Quarterly* 659 at 667.

¹⁰⁷⁴ Gomien D *et al Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing (1996)) 424.

Committee of Ministers have already been reported on. For example, there has been a “remarkable change of attitude within the Committee of Ministers...it has demonstrated the political will to adopt recommendations concerning individual parties and, in doing so, to accept all of the proposals for recommendations put to it by the Governmental Committee.”¹⁰⁷⁵

(f) Collective Complaints

Apart from the national report-based system of supervision, provision has been made for the so-called Collective Complaints system of supervision.¹⁰⁷⁶ This system was introduced with the aim of increasing the efficiency of the supervisory machinery.¹⁰⁷⁷ In line with this system, certain organisations¹⁰⁷⁸ may lodge a complaint alleging unsatisfactory application of the *European Social Charter*. The task of considering the complaint is executed by the Committee of Experts. After considering the complaint, the Committee of Experts communicates its conclusions to the Committee of Ministers. Article 9(1) of the *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* requires the Committee of Ministers to adopt a resolution by a majority of those voting. The adoption of a resolution by the Committee of Ministers terminates the Collective Complaints procedure and the recommendation contained in the resolution is not legally binding. The Collective Complaints system has thus far been swift. However, this may change should the number of complaints rise in future.¹⁰⁷⁹ A few points of criticism have been levelled against the Collective Complaint system. For example, this system is, as its name suggests, aimed at

¹⁰⁷⁵ *Ibid* 426.

¹⁰⁷⁶ See the *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* (European Treaty Series No. 158 of 1995). Also see Birk R “The collective complaint: A new procedure in the European Social Charter” in Engels C and Weiss M (eds) *Labour Law and Industrial Relations at the Turn of the Century* (Kluwer (1998)) 261.

¹⁰⁷⁷ Preamble of the *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints*.

¹⁰⁷⁸ They include international organisations of employers and trade unions, other international non-governmental organisations which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee and representative national organisations of employers and trade unions within the jurisdiction of the contracting party against which they have lodged a complaint (article 1 of the *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints*).

¹⁰⁷⁹ Churchill RR and Khaliq U “The collective complaints system of the European Social Charter: An effective mechanism for ensuring compliance with economic and social rights?” (2004) 15 *European Journal of International Law* 417 at 446.

collective and not individual complaints.¹⁰⁸⁰ Another point of criticism relates to the involvement of the Committee of Ministers. It is argued that the involvement of the Committee of Ministers (which is a political body) in something which is supposed to be an independent (quasi-judicial) process is undesirable. Central to this argument is the fact that: “The defendant state, unlike the complainant, takes part in the Committee’s proceedings and may vote; the decisions of the Committee are unreasoned; and finding of non-compliance requires two-thirds majority, whereas the [European Committee of Social Rights] decides by simple majority. It is possible that for political reasons the Committee may delay in dealing with a complaint.”¹⁰⁸¹ Furthermore, there are few countries which are bound by the system.¹⁰⁸²

4.1.3.2. European Code of Social Security

The *European Code of Social Security* is supervised, to a large extent, in the same way as the *European Social Charter*.¹⁰⁸³ National reports are examined by the Committee of Experts in co-operation with the ILO.¹⁰⁸⁴ At the end of the supervisory process the Committee of Ministers invites the contracting party concerned “to take such measures as the Committee of Ministers considers necessary to ensure such compliance.”¹⁰⁸⁵ In the case of the Signatory whose system is found not to conform with the *European Code of Social Security*, the Committee of Ministers has the discretion to make recommendations to the Signatory concerned as to how it can achieve the required conformity.¹⁰⁸⁶ The criticism levelled against the *European Social Charter* is to a large extent valid for the supervisory process of the *European Code of Social Security*.

¹⁰⁸⁰ See *ibid* at 424-429.

¹⁰⁸¹ *Ibid* 447.

¹⁰⁸² According to Alston (Alston P “Strengths and weaknesses of the ESC’s supervisory system” in De Búrca G and De Witte B (eds) *Social Rights in Europe* (Oxford University Press (2005)) 45 at 66) only thirteen states, or less than one-third of the forty-four which have signed (thirty-four have ratified) either the *European Social Charter* or the *European Social Charter (Revised)* have accepted the Collective Complaints procedure.

¹⁰⁸³ See articles 74, 75 and, to a certain extent, 78 of the *European Code of Social Security*.

¹⁰⁸⁴ See article 74(4) and (5) of the *European Code of Social Security*.

¹⁰⁸⁵ Article 75(2) of the *European Code of Social Security*.

¹⁰⁸⁶ Article 78(5) of the *European Code of Social Security*.

4.1.3.3. Some observations

As shown in the preceding discussion, the supervisory system contained in the *European Social Charter* is, with the exception of the Committee of Experts, not adequately independent of the contracting parties. The Committee of Experts comprises of independent experts¹⁰⁸⁷ and it is assisted – albeit in a consultative capacity – by a representative of the ILO. Furthermore, the conclusions of the Committee of Experts and the recommendations of the Committee of Ministers are not binding. This problem is exacerbated by the lack of punitive measures against contracting parties which fail to comply with their obligations. Moreover, the Collective Complaints arrangement – in view of the fact that it parallels the National Reports system – may yield some unintended consequences. For instance, once the Collective Complaint system “is more extensively used in future, the burden that this will impose on the part-time ECSR [European Committee of Social Rights] members, in addition to their duties under the reporting system, will become more difficult to manage.”¹⁰⁸⁸ In addition, “a state may become reluctant to engage in frank constructive dialogue of its problems in the reporting phase if it is likely to have to face that committee in a quasi-judicial context.”¹⁰⁸⁹ The above conclusions regarding the supervision of the *European Social Charter* are, for the most part, applicable to the supervision of the *European Code of Social Security*.

4.1.4. Influence of Council of Europe’s social security standards

The Council has, since its inception, been influential in shaping social security in Europe. Through its legal instruments, the Council has been able to set (social security) minimum standards¹⁰⁹⁰ and develop social security coordination in Europe. The influence of the

¹⁰⁸⁷ See Evju S “The European Social Charter” in Blanpain R (ed) *The Council of the Europe and the Social Challenges of XXIst Century* (Kluwer (2001)) 19 at 23.

¹⁰⁸⁸ Churchill RR and Khaliq U “The collective complaints system of the European Social Charter: An effective mechanism for ensuring compliance with economic and social rights?” (2004) 15 *European Journal of International Law* 417 at 448.

¹⁰⁸⁹ *Ibid.*

¹⁰⁹⁰ See, for example, Gori G “Domestic enforcement of the European Social Charter: The way forward” in De Búrca G and De Witte B (eds) *Social Rights in Europe* (Oxford University Press (2005)) 69, Akandji-Kombé J-F “The material impact of the European Committee of Social Rights” in De Búrca G and De Witte B (eds) *Social Rights in Europe* (Oxford University Press (2005)) 89, Biagi M and Salomone R “Social Europe and

Council's instruments (in the development of minimum (social security) standards) is not restricted to Europe. For example, it is reported that the "ILO conventions of the 1960s and later years have...adopted standards that approach those of the Protocol to the European Code [of Social Security]."¹⁰⁹¹

4.2. Council of Europe standards and (un)employment protection

4.2.1. Unemployment protection

4.2.1.1. Introduction

The *European Code of Social Security* and the *European Code of Social Security (Revised)* make provision for the following unemployment and unemployment-related benefits: unemployment benefit, sickness benefit, maternity benefit, invalidity benefit and survivors' benefit. The cost of these benefits and associated administrative costs are to borne collectively.¹⁰⁹² The collective responsibility towards the costs should be carried out in such a way as to prevent hardship to persons with limited means and take account of the capacity of the persons protected to contribute.¹⁰⁹³ In addition, unemployment (and unemployment-related benefits) may, in certain instances,¹⁰⁹⁴ be withheld, withdrawn or suspended.¹⁰⁹⁵ In

labour law: The role of the European Social Charter" in Blanpain R (ed) *The Council of Europe and the Social Challenges of XXIst Century* (Kluwer (2001)) 71 and Jaspers A. Ph. C.M and Betten L (eds) *25 Years: European Social Charter* (Kluwer (1988)).

¹⁰⁹¹ Pennings F and Schulte B "International social security standards: An overview" in Pennings F (ed) *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer (2006)) 1 at 23.

¹⁰⁹² Article 76(1) of the *European Code of Social Security (Revised)*. Also see article 70 of the *European Code of Social Security*.

¹⁰⁹³ *Ibid.*

¹⁰⁹⁴ These instances include, among others, the following: where the contingency has been caused by a criminal offence committed by the person concerned; where the contingency has been caused by the wilful misconduct of the person concerned; where the person concerned has obtained or sought to obtain the benefit concerned by means of a fraudulent claim; in the case of unemployment benefit – under prescribed conditions where the person concerned has stopped work in order to take part in a labour dispute, or is prevented from working or has lost his job as a direct result of a labour dispute, or has left work of his own volition without just cause; where the person concerned neglects to make use of the employment services that are available; for as long as the person concerned is being maintained at public expense, or at the expense of a social security institution or service; for as long as the person concerned is in receipt of another social security cash benefit, other than a family benefit, and during any period in respect of which compensation is being paid for the same contingency by a third party, subject to the part of the benefit which is suspended not exceeding the other benefit or the

the event of a dispute arising out of the withholding, withdrawal or suspension of a benefit, the aggrieved party, as envisaged by the *European Code of Social Security (Revised)*, shall have the right to appeal to the competent jurisdiction.¹⁰⁹⁶ The aforementioned appeal shall be free of charge.¹⁰⁹⁷ This provision depends on the prescribed conditions unless the aggrieved person has a prior right of appeal free of charge to a competent authority.¹⁰⁹⁸ Furthermore, unemployment benefits are provided in accordance with the calculation methods set out in Part XI of the *European Code of Social Security* and Part XI of the *European Code of Social Security (Revised)*. These methods of calculating benefits are, according to the *European Code of Social Security (Revised)*, based either on the previous earnings of the beneficiary or of the beneficiary's breadwinner,¹⁰⁹⁹ or on the minimum legal or inter-occupational wage or

compensation paid by the third party; in the case of benefit payable to a surviving spouse, for as long as the surviving spouse cohabits with another person; and in the case of invalidity, old-age and survivors' benefit, as long as the person concerned is engaged in gainful activity (article 74(1) of the *European Code of Social Security (Revised)*). It should be noted that a part of the benefit which would normally have been paid shall be paid to the dependants of the person concerned unless they benefit from another form of protection (article 74(2) of the *European Code of Social Security (Revised)*).

¹⁰⁹⁵ See article 68 of the *European Code of Social Security*.

¹⁰⁹⁶ Article 75(1) of the *European Code of Social Security (Revised)*. Also see article 69 of the *European Code of Social Security*.

¹⁰⁹⁷ *Ibid.*

¹⁰⁹⁸ *Ibid.*

¹⁰⁹⁹ Article 71 of the *European Code of Social Security (Revised)*. In accordance with article 71, the amount of any periodical payment shall for a beneficiary considered alone, be at least equal to the percentage of the previous earnings of the beneficiary or of the beneficiary's breadwinner in respect of the contingency in question as illustrated in the Schedule to Part XI of the *European Code of Social Security (Revised)* (ECSSR). In the case of a beneficiary with dependants, the amount payable shall be increased by any family benefits and shall, in respect of the contingency in question, be at least equal to the percentages indicated in the Schedule to Part XI of the *European Code of Social Security (Revised)*. The ECSSR does not proscribe a situation where national legislation places a ceiling on the periodical payment or on the amount of earnings. Even so, contracting parties have to take care that such a ceiling is fixed in such a way that it complies with the *European Code of Social Security (Revised)*. It should be noted that the previous earnings of the beneficiary or the beneficiary's breadwinner, are calculated on the same time basis. Furthermore, in the event the legislation of the contracting party subjects periodical payment to tax or social security contributions, the previous earnings of the beneficiary or the beneficiary's breadwinner to be taken into account shall be one of the two following situations. That is the gross earnings before any tax or social security contributions, in which case the periodical payment to be compared with these earnings shall be the gross periodical payment before any tax, or social security contributions or the earnings net of any tax or social security contributions, in which case the periodical payment to be compared with these earnings shall be the periodical payment net of any tax or social security contributions. The ECSSR does, apart from the foregoing, make provision for a situation when the payment of invalidity, old-age or survivors' benefit is claimed. In such a case, it provides that "the amount of the previous earnings of the claimant or of his breadwinner to be taken into account in calculating the amount of the periodical payments to be made in respect of invalidity, old-age or the death of the breadwinner shall be reviewed, under prescribed conditions, following any appreciable changes in the general level of earnings or in the cost of living" (article 71(11) of the ECSSR).

wage of an ordinary labourer¹¹⁰⁰ or on a prescribed scale and on the means of the beneficiary and his or her family.¹¹⁰¹

4.2.1.2. Contingency covered

(a) Unemployment benefit

Provisions relating to the unemployment benefit are embodied in Part IV of the *European Code of Social Security* and Part IV of the *European Code of Social Security (Revised)*. Article 20 of the *European Code of Social Security* provides, similarly to the *Social Security (Minimum Standards) Convention*, that the contingency to be covered shall include the “suspension of earnings, as defined by national laws or regulations, due to inability to obtain suitable employment in the case of a person protected who is capable of, and available for, work.” Few observations flowing from this provision can be made. Firstly, the contingency covered is the ‘suspension of earnings’. This restricts the scope of Article 20 of the *European Code of Social Security* to previously employed persons. As a result persons who have never worked, but who intend to engage in paid employment, are excluded. Secondly, the task of ascertaining what constitutes ‘suspension of earnings’ is left to the ‘national laws or

¹¹⁰⁰ Article 72 of the ECSSR. This article applies to social security schemes which provide cash benefits at a uniform rate. The amount of any periodical payment shall, in line with article 72(1)(a), for a beneficiary considered alone, be no less than the percentage of the minimum legal or minimum inter-occupational wage, or of the wage of an ordinary labourer, in respect of the contingency in question as shown in the Schedule to Part XI of the ECSSR. In the case of a beneficiary with dependants, the amount payable shall be increased by family benefits and shall, in respect of the contingency in question, be no less than the percentage of the sum of the minimum legal or minimum inter-occupational wage, or of the wage of an ordinary labourer, and the amount of any family allowances payable to a protected person with the same family responsibilities as the beneficiary as specified in the Schedule to Part XI of the ECSSR. It should be borne in mind that the minimum wage, the wage of an ordinary labourer, the periodical payment and the family allowances shall be calculated on the same time basis. Furthermore, the provisions relating to when periodical payments are subject to tax or social security contributions contained in article 72 are analogous to those found in article 71.

¹¹⁰¹ Article 73 of the ECSSR. This applies to instances where the legislation of a contracting party makes provision for the payment of a benefit subject to a means test. Contracting parties may, therefore, apply this article when calculating the following benefits: unemployment benefit – i.e. when the benefit is provided without any qualifying period to the classes of persons who have never belonged or who have ceased to belong to the group of protected persons, and when the payments are continued beyond a minimum period of thirty-nine (39) weeks (article 21(3) of the ECSSR); invalidity benefit – i.e. when all residents are protected without making entitlement to invalidity benefit conditional on the completion of any qualifying period and in the case of a person not economically active who is incapacitated to a prescribed extent to engage in his usual activities (article 60(3) of the ECSSR); and survivors’ benefit – i.e. when all survivors without resident status are protected and without making entitlement to benefit conditional on the completion of any qualifying period (article 66(2) of the ECSSR).

regulations'. This is problematic in that there is a diversity of situations which could result in the suspension of earnings (for example, voluntary unemployment, involuntary unemployment, dismissal, constructive dismissal and industrial action) and in each of these situations contracting parties are at liberty to choose whether or not unemployment benefit should be granted or not.¹¹⁰² In addition, the *European Code of Social Security* neglected to explain what is meant by a person "who is capable of, and available for, work."¹¹⁰³ Some clarification in this regard could have been useful seeing that this phrase is, in some instances, a part of the conditions to be complied with before a prospective beneficiary could receive the unemployment benefit.

The *European Code of Social Security (Revised)*, unlike the *European Code of Social Security*, lists the contingencies covered by the unemployment benefit as total unemployment and partial unemployment. Total unemployment is defined as "the absence of earnings due to the inability to obtain suitable employment, in the case of a person protected who is capable of, available for and actually seeking employment."¹¹⁰⁴ Partial unemployment refers to the "loss of earnings, due to either or both of the following situations: a reduction of the working hours in comparison with the normal or legal working time, for reasons other than the worker's state of health or personal convenience, without termination of the work relationship; the inability to obtain suitable full-time employment, in the case of an unemployed person who, while accepting part-time employment, is available for and actually seeking full-time employment."¹¹⁰⁵ As is apparent from the preceding definitions of 'total unemployment' and 'partial unemployment', the *European Code of Social Security (Revised)* replaces the concept of a 'suspension of earnings' as contained in the *European Code of Social Security* and the Protocol with the 'absence of earnings' (that is in the case of total unemployment) and 'loss of earnings' (in an event of partial unemployment). The *European Code of Social Security (Revised)* does not impose a duty of the contracting parties to cover all groups of persons who were never employed. Nevertheless, it requires them to include certain categories of persons who were never employed (e.g. young persons who have

¹¹⁰² Nickless J *European Code of Social Security: Short Guide* (Council of Europe Publishing (2002)) 37.

¹¹⁰³ Article 20 of the *European Code of Social Security*.

¹¹⁰⁴ Article 19(a) of the *European Code of Social Security (Revised)*.

¹¹⁰⁵ Article 19(b) of the *European Code of Social Security (Revised)*.

graduated from vocational training) or have taken a lengthy break from gainful employment (e.g. parents who have taken a break to care for a child).¹¹⁰⁶

(b) Sickness benefit

According to the *European Code of Social Security*, the contingency shall include incapacity for work ensuing from a morbid condition (that is any condition that requires medical care)¹¹⁰⁷ and involving suspension of earnings.¹¹⁰⁸ It should be noted that the *European Code of Social Security* draws a line of demarcation between morbid condition and treatment required for pregnancy and child birth.¹¹⁰⁹ The sickness benefit does not cover maternity and birth-related incapacity since this is covered separately under the contingency of maternity.¹¹¹⁰ Unlike in the case of the *European Code of Social Security*, the contingency covered by the sickness benefit in the *European Code of Social Security (Revised)* is the incapacity for work resulting from an illness or accident and entailing suspension of earnings as defined by national legislation.¹¹¹¹

(c) Maternity benefit

The contingencies covered by the maternity benefit include pregnancy, confinement and their consequences as well as the resulting suspension of earnings.¹¹¹² The *European Code of Social Security (Revised)* clearly separates the contingency covered by the medical benefits from that covered by the maternity benefit in that it removed the overlap between the medical benefit (as provide for in Part II of the *European Code of Social Security*) and the maternity benefit (as provided for in Part VIII of the *European Code of Social Security*).¹¹¹³ The implication of this development is that “should the contracting party only ratify Part II of the

¹¹⁰⁶ Article 20(3) of the *European Code of Social Security (Revised)*.

¹¹⁰⁷ Nickless J *European Code of Social Security: Short Guide* (Council of Europe Publishing (2002)) 35.

¹¹⁰⁸ Article 14 of the *European Code of Social Security*.

¹¹⁰⁹ See article 8 of the *European Code of Social Security* and Nickless J *European Code of Social Security: Short Guide* (Council of Europe Publishing (2002)) 30.

¹¹¹⁰ Nickless J *European Code of Social Security: Short Guide* (Council of Europe Publishing (2002)) 35.

¹¹¹¹ Article 13 of the *European Code of Social Security (Revised)*.

¹¹¹² Article 51 of the *European Code of Social Security (Revised)* and article 47 of the *European Code of Social Security*.

¹¹¹³ Nickless J *European Code of Social Security: Short Guide* (Council of Europe Publishing (2002)) 55.

Revised Code on Medical Care and not Part VIII on Maternity it will not be obliged to provide medical treatment specifically designed for pregnant women and women who have just given birth.”¹¹¹⁴

(d) Invalidity benefit

The invalidity benefit is aimed at providing a safety net “in the case of an economically active person, incapacity to a prescribed extent to work or earn; in the case of a person not economically active, incapacity to a prescribed extent to engage in his usual activities; incapacity to a prescribed extent of a child resulting from congenital disability or from invalidity occurring before the school-leaving age, where such incapacity is likely to be permanent or where it persists after the expiry of a prescribed period of temporary or initial incapacity.”¹¹¹⁵

(e) Survivors’ benefit

The contingency covered by survivors’ benefit is the loss of support suffered by the surviving spouse and children due the death of the breadwinner.¹¹¹⁶

4.2.1.3. Scope of coverage

(a) Unemployment benefit

The scope of coverage of the unemployment benefit as provided for by the *European Code of Social Security* extends to prescribed classes of employees (constituting not less than 50 per cent of all employees) or all residents whose means during the contingency do not exceed the prescribed limits.¹¹¹⁷ Accordingly, the *European Code of Social Security* recognises, in as far

¹¹¹⁴ *Ibid.*

¹¹¹⁵ Article 58 of the *European Code of Social Security (Revised)*. Also see article 54 of the *European Code of Social Security*.

¹¹¹⁶ Article 64(1) of the *European Code of Social Security (Revised)* and article 60(1) of the *European Code of Social Security*.

¹¹¹⁷ Article 21 of the *European Code of Social Security*.

as the scope of coverage for unemployment benefits is concerned, the provision of unemployment benefits through an insurance system as well as a means-tested system. In accordance with the *European Code of Social Security (Revised)*, the categories of persons to be protected by the unemployment benefit include all employees (including apprentices) or prescribed classes of the economically active population, constituting in all at least 70% of the total economically active population.¹¹¹⁸ The *European Code of Social Security (Revised)* envisages the provision of a means-tested unemployment benefit to at least two classes of categories of persons who have never belonged, or who have ceased to belong to the group of protected persons.¹¹¹⁹ This deviates from the approach of the *European Code of Social Security* which excluded persons who were never employed.

(b) Sickness benefit

The *European Code of Social Security* provides the ‘sickness benefit’ to prescribed classes of employees (constituting not less than 50 per cent of all employees), or prescribed classes of the economically active population (constituting not less than 20 per cent of all residents), or all residents whose means during the contingency do not exceed prescribed limits.¹¹²⁰ The *European Code of Social Security (Revised)*, on the other hand, provides sickness benefits to all employees (including apprentices) or prescribed classes of the economically active population, constituting in all at least 80% of the total economically active population.¹¹²¹

¹¹¹⁸ Article 20(1)(a) and (b) of the *European Code of Social Security (Revised)*. It should be noted, however, that contracting parties may exclude employees constituting no more than fifteen percent (15%) of all employees (article 20(2)(a) of the *European Code of Social Security (Revised)*). In addition, a contracting party may exclude civil servants enjoying prescribed guarantees of employment security (article 20(2)(b) of the *European Code of Social Security (Revised)*).

¹¹¹⁹ Article 20(3) of the *European Code of Social Security (Revised)*. These classes of categories of person that never belonged or ceased to belong to the group of protected persons comprise of young persons having completed vocational training; young persons having completed their studies; young persons discharged from compulsory military service; parents at the end of a period devoted to bringing up a child after the end of maternity leave; persons whose spouse is deceased; divorced persons; discharged prisoners and persons with disabilities who have completed their occupational rehabilitation.

¹¹²⁰ Article 15 of the *European Code of Social Security*.

¹¹²¹ Article 14(1) of the *European Code of Social Security (Revised)*. It should be noted, however, that contracting parties may, in accordance with article 14(2) of the *European Code of Social Security (Revised)*, exclude classes of employees constituting no more than ten (10) percent of all employees.

(c) Maternity benefit

The *European Code of Social Security*'s scope of coverage of the maternity benefit extends to the following categories of women: all women in prescribed classes of employees (constituting not less than 50 per cent of all employees) or all women in prescribed classes of the economically active population (constituting not less than 20 per cent of all resident).¹¹²²

The *European Code of Social Security (Revised)*, on the other hand, provides coverage to: all employed women including female apprentices, and their female children, together with the dependent wives of employees, including apprentices, and their female children; or all economically active women and their female children, together with all dependent wives of economically active men and their female children; or all women residents.¹¹²³ The persons protected in the case of the resulting suspension of earnings include all employed women, including female apprentices, or all women belonging to prescribed classes of the economically active population constituting in all at least 80% of the total economically active population. The foregoing provisions relating to scope of coverage of the maternity benefits is not absolute. Contracting parties have the discretion to exclude certain classes¹¹²⁴ of women from the ambit of the maternity benefit.

¹¹²² Article 48 of the *European Code of Social Security*.

¹¹²³ Article 52(1)(a) of the *European Code of Social Security (Revised)*.

¹¹²⁴ These classes include among others the following: women belonging to classes of employees constituting in all no more than 5% of all employees, and their female children, together with the wives of men belonging to these classes, and their female children; or women belonging to classes of the economically active population constituting in all no more than 10% of the total economically active population, and their female children, together with the wives of men belonging to these classes, and their female children; or women belonging to classes of residents constituting in all no more than 10% of all residents, and their female children (article 52(2)(a) of the *European Code of Social Security (Revised)*). Apart from the foregoing, contracting parties may exclude women receiving any or applying for one of the following benefits, namely: invalidity, old-age or survivors' benefit; benefit for permanent disablement to a prescribed degree or survivors' benefit, in the case of a work accident or occupational disease; and unemployment benefit (article 52(3) of the *European Code of Social Security (Revised)*). This provision applies also to dependent wives of men who are receiving or claiming the aforementioned benefits (article 52(3) of the *European Code of Social Security (Revised)*). Lastly, a contracting party has a discretion to derogate from the provision relating to the scope of coverage concerning maternity benefit if its legislation guarantees medical care to prescribed classes of employed women constituting in all at least 80% of all employed women; or to prescribed classes of economically active women in all at least 75% of the total economically active women; or to prescribed classes of women residents constituting in all at least 70% of all women residents, and in the case of illness resulting from pregnancy and requiring long-term care, to all women residents (article 52(4) of the *European Code of Social Security (Revised)*).

(d) Invalidity benefit

The categories of persons covered by this benefit shall, as envisaged by the *European Code of Social Security*, include prescribed classes of employees (constituting not less than 50 per cent of all employees), or prescribed classes of the economically active population (constituting not less than 20 per cent of all resident), or all residents whose means during the contingency do not exceed the prescribed limits.¹¹²⁵ The scope of coverage under the *European Code of Social Security (Revised)*, include all employees (including apprentices) or prescribed classes of the economically active population constituting in all no less than 80% of the total economically active population or all residents.¹¹²⁶ Despite the foregoing, contracting parties may exclude classes of employees constituting in all no more than 10% of all employees or classes of residents constituting in all no more than 10% of all residents.¹¹²⁷

(e) Survivors' benefit

This benefit, as evident from its name, is intended at the surviving spouse and children at the death of the breadwinner.¹¹²⁸ The *European Code of Social Security (Revised)*, as regards survivors' benefit, moved away from the male bread winner model¹¹²⁹ which was prevalent at the time the *European Code of Social Security* was adopted by replacing the word 'wives' with the concept 'spouses'. This, apart from taking the new family structure into account,¹¹³⁰ appreciates the current labour market developments. The preceding assertion stems from the fact that "more women continue to work after marriage and women in general are encouraged to become much more independent."¹¹³¹

¹¹²⁵ Article 55 of the *European Code of Social Security*.

¹¹²⁶ Article 59(1) of the *European Code of Social Security (Revised)*.

¹¹²⁷ Article 59(2).

¹¹²⁸ Article 64(1) of the *European Code of Social Security (Revised)* and article 60(1) of the *European Code of Social Security*.

¹¹²⁹ See Pennings F and Schulte B "Some current points of discussion concerning social security conventions" in Pennings F (ed) *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer (2006)) 43 at 46-47.

¹¹³⁰ *Ibid* at 46.

¹¹³¹ Nickless J *European Code of Social Security: Short Guide* (Council of Europe Publishing (2002)) 61.

4.2.1.4. Types of benefits

(a) Unemployment benefit

The payment of unemployment benefit for total unemployment shall, in accordance with the *European Code of Social Security* and the *European Code of Social Security (Revised)*, take the form of periodical payments. According to the *European Code of Social Security (Revised)*, a contracting party may require, by means of legislation, that the payment of an unemployment benefit for total unemployment be payable after a waiting period has lapsed. Such a waiting period shall, however, not exceed the first three days of unemployment in each case of unemployment, the days of unemployment before and after temporary employment not exceeding a prescribed period being counted as part of the same case of unemployment; or the first six days in the course of a period of twelve months.¹¹³² It should be borne in mind, nevertheless, that the waiting period may be increased to twenty-six weeks if the benefit is awarded without qualifying conditions to classes of persons which do not belong or never belonged to protected classes.¹¹³³ Furthermore, contracting parties have the discretion to adapt the waiting period for seasonal workers to the conditions of their occupational activity.¹¹³⁴

The payment of unemployment benefit for partial unemployment, similar to that of total unemployment, shall also take the form of periodical payments calculated on the basis of the previous earnings of the beneficiary or of the beneficiary's breadwinner, or on the minimum legal or inter-occupational wage or wage of an ordinary labourer. Unlike in the case of total unemployment, periodical payments for partial unemployment constitute equitable compensation for loss of earnings due to unemployment such that the sum of the recipient's earnings and the benefit for partial unemployment at least equal the amount of the benefit which would be paid in the case of total unemployment.¹¹³⁵ Despite the foregoing, periodical payments awarded without any qualifying period to classes of persons which do not belong

¹¹³² Article 23(1) of the *European Code of Social Security (Revised)*.

¹¹³³ Article 23(3).

¹¹³⁴ Article 23(2).

¹¹³⁵ Article 21(2) of the *European Code of Social Security (Revised)*.

or never belonged to protected classes of protected persons or in the event payments continued beyond a minimum period of thirty-nine weeks may be calculated on a prescribed scale and on the means of the beneficiary and his or her family.

Unemployment benefit, apart from being payable in the form of periodical payments, are payable throughout the duration of unemployment or until the payment of old-age, invalidity or rehabilitation cash benefit.¹¹³⁶ It should be noted nonetheless that the duration for the cash benefit may be limited.¹¹³⁷ The cash benefit for total unemployment may accordingly be limited either to thirty-nine weeks in a period of twenty four months or to thirty-nine weeks in each case of unemployment.¹¹³⁸ In the case of partial employment, contracting parties have the discretion to limit the payment of the cash benefit to a prescribed period.¹¹³⁹

Contracting parties may provide unemployment benefits subject to a qualifying period.¹¹⁴⁰ Such a qualifying period shall, however, be no longer than is considered necessary to prevent abuse.¹¹⁴¹ The qualifying period may, nonetheless, be adapted to the conditions of the occupational activities of seasonal workers¹¹⁴² and to the special situation of classes of persons who do not belong or never belonged to protected classes.¹¹⁴³ The *European Code of Social Security (Revised)* requires each contracting party to secure to the persons protected, occupational guidance, training, retraining and (re)integration services.¹¹⁴⁴ The goal of these services is to assist protected persons to keep or obtain suitable employment.¹¹⁴⁵ These measures are not only aimed at total or partial unemployment but also in a situation when protected persons are threatened with imminent unemployment.¹¹⁴⁶ Each contracting party is required to provide protected persons with aids to occupational mobility and, where

¹¹³⁶ Article 24 of the *European Code of Social Security (Revised)*.

¹¹³⁷ *Ibid.*

¹¹³⁸ *Ibid.*

¹¹³⁹ *Ibid.*

¹¹⁴⁰ 'Qualifying period' means, in accordance with article 1(e) of the *European Code of Social Security (Revised)*, "a period of occupational activity or period of residence, including any period treated as such or any combination thereof, as may be prescribed for conferring entitlement to benefit."

¹¹⁴¹ Article 22(1).

¹¹⁴² Article 22(2).

¹¹⁴³ Article 22(3).

¹¹⁴⁴ Article 25(1).

¹¹⁴⁵ *Ibid.*

¹¹⁴⁶ *Ibid.*

necessary, geographical mobility so as to encourage recourse to the abovementioned services.¹¹⁴⁷

(b) Sickness benefit

A sickness benefit is, as required by *European Code of Social Security*¹¹⁴⁸ as well as the *European Code of Social Security (Revised)*, in the form of periodical payments.¹¹⁴⁹ It is calculated in the same manner as unemployment benefits. Contracting parties may through legislation, similarly to unemployment benefit, require that sickness benefits be payable only after a waiting period has elapsed.¹¹⁵⁰ Such a period may, however, not exceed the first three days of the suspension of earnings.¹¹⁵¹ Sickness benefits are payable throughout the contingency covered or until the payment of old-age, invalidity or rehabilitation cash benefits.¹¹⁵² Nevertheless, contracting parties have the discretion to limit the duration of the payment of sickness benefits to fifty-two weeks for each case of illness or to seventy-eight weeks in any consecutive period of three years.¹¹⁵³ Furthermore, in the event of the death of a person in receipt or entitled to receive sickness benefit, the *European Code of Social Security (Revised)* makes provision for the payment of a grant for funeral expenses to the deceased's survivors, dependants or other persons specified by national legislation.¹¹⁵⁴ Similarly to unemployment benefit, contracting parties which make the payment of sickness benefit subject to the completion of a qualifying period are required to ensure that such period is not longer than is considered necessary to prevent abuse.¹¹⁵⁵

¹¹⁴⁷ Article 25(2).

¹¹⁴⁸ Article 16(1) of the *European Code of Social Security*.

¹¹⁴⁹ Article 15 of the *European Code of Social Security (Revised)*.

¹¹⁵⁰ Article 17 of the *European Code of Social Security (Revised)*.

¹¹⁵¹ *Ibid.*

¹¹⁵² Article 17(3).

¹¹⁵³ *Ibid.*

¹¹⁵⁴ Article 18(1).

¹¹⁵⁵ Article 16.

(c) Maternity benefit

The maternity cash benefit is, in the same way as unemployment and sickness benefits, a periodical payment.¹¹⁵⁶ The calculation of the maternity cash benefit is similar to that of unemployment and sickness benefits. Maternity cash benefit is payable throughout the duration of the contingency covered.¹¹⁵⁷ The duration of the payment of maternity cash benefit may, however, be limited to fourteen weeks unless the duration of the compulsory period of absence from work is longer, in which case maternity benefit shall be paid throughout that period.¹¹⁵⁸ Contracting parties, just like in the case of other benefits, may make the entitlement to maternity cash benefit conditional on a qualifying period.¹¹⁵⁹ That period shall, however, not be longer than is considered necessary to prevent abuse.¹¹⁶⁰

(d) Invalidity benefit

The invalidity benefit is, similar to other benefits, a periodical payment.¹¹⁶¹ These periodical payments are calculated on the basis of the previous earnings of the beneficiary or of the beneficiary's breadwinner or on the minimum legal or inter-occupational wage or wage of an ordinary labourer. Despite the foregoing, periodical payments may be calculated in accordance with article 73 by any Party whose legislation protects all residents without making entitlement to invalidity benefit conditional on the completion of any qualifying period.¹¹⁶² In addition to the foregoing, the qualifying period for the invalidity benefit may not be longer than five years.¹¹⁶³ Furthermore, it is payable throughout the duration of the contingency covered or until the payment of old-age or survivors' benefit.¹¹⁶⁴

¹¹⁵⁶ Article 54.

¹¹⁵⁷ Article 56(2).

¹¹⁵⁸ *Ibid.*

¹¹⁵⁹ Article 55.

¹¹⁶⁰ *Ibid.*

¹¹⁶¹ Article 60(1).

¹¹⁶² Article 60(2).

¹¹⁶³ Article 61(1).

¹¹⁶⁴ Article 63.

(e) Survivors' benefit

Eligibility for the survivors' benefit by the surviving spouse may be made conditional upon the attainment of the prescribed age.¹¹⁶⁵ An age requirement may not be imposed where the spouse is presumed to be unfit for work or where the spouse has at least one dependent child.¹¹⁶⁶ Eligibility may, in the case of a childless surviving spouse, be made conditional upon a prescribed duration of marriage.¹¹⁶⁷ Categories of persons covered by survivors' benefit shall, as required by the *European Code of Social Security (Revised)*, comprise of the surviving spouses and children of breadwinners who were employees or apprentices; or the surviving spouses and children of breadwinners who belonged to prescribed classes of the economically active population constituting in all at least 80% of the total economically active population; or all resident surviving spouses and children or all surviving spouses and children who have lost their breadwinner who was resident.¹¹⁶⁸ Despite the foregoing, contracting parties may exclude classes of employees whose total number constitutes no more than 10% of all employees or classes of residents whose total number constitutes no more than 10% of all residents.¹¹⁶⁹ Survivors' benefit is in the same way as other benefits, discussed above, a periodical payment which is calculated on the basis of the previous earnings of the beneficiary's breadwinner, or on the minimum legal or inter-occupational wage or wage of an ordinary labourer. As an exception to the foregoing, periodical payments may be calculated in accordance with a prescribed scale and on the means of the beneficiary and his or her family in the case of a contracting party whose legislation protects survivors with resident status, without making entitlement to benefit conditional on the completion of any qualifying period.¹¹⁷⁰ In addition, the qualifying period may not exceed five years¹¹⁷¹ and the benefits are payable throughout the contingency covered or until replaced by invalidity or old-age benefits.¹¹⁷²

¹¹⁶⁵ Article 64(2).

¹¹⁶⁶ Article 64(3).

¹¹⁶⁷ Article 64(4).

¹¹⁶⁸ Article 65(1).

¹¹⁶⁹ Article 65(2).

¹¹⁷⁰ Article 66(2).

¹¹⁷¹ Article 67(1).

¹¹⁷² Article 68.

4.2.1.5. Some observations

The Council of Europe's unemployment protection standards mirror, to a large extent, those contained in the ILO's unemployment protection instruments (such as the *Social Security (Minimum Standards) Convention*). This is evident from, for example, the provisions relating to the financing of benefits, the right of appeal of claimants and the rules concerning the suspension of benefit, the scope of coverage and the type of benefits. One of the reasons for this situation is that the *European Code of Social Security* has copied most of its provisions from the *Social Security (Minimum Standards) Convention*. Despite that, it should be pointed out that the benefit levels provided by the *European Code of Social Security* are higher than those of the *Social Security (Minimum Standards) Convention*. This, it appears, underscores the point that – although regions of the world may draw some inspiration from the *Social Security (Minimum Standards) Convention* when setting their unemployment protection standards – regional standards can be set according to the regions' social and economic situations. The unemployment protection standards of the Council of Europe are set at a higher level than those of the ILO. The rationale behind this is that Council of Europe member states are socially and economically more advanced than most of the ILO member states.¹¹⁷³ The Southern African Development Community (SADC), in its quest to set unemployment protection standards, should take into account the social and economic strength of the region. This implies that it should, through the passage of time, revise its unemployment protection standards to reflect any social and economic development that may have occurred.

4.2.2. Social security coordination

4.2.2.1. Introduction

Several social security coordination instruments of the Council of Europe are identifiable. These instruments comprise of the two *European Interim Agreements on Social Security*

¹¹⁷³ Pennings F and Schulte B "International social security standards: An overview" in Pennings F (ed) *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer (2006)) 1 at 24.

Schemes (relating to old age, invalidity and survivors¹¹⁷⁴ and relating to schemes other than schemes for old age, invalidity and survivors¹¹⁷⁵), the *European Convention on Social Security* and its Protocol and (to a certain extent) the *European Convention on Social and Medical Assistance*.¹¹⁷⁶ With the aforementioned in mind, social security coordination within the unemployment protection context is provided for in the *European Social Charter* (to a certain degree), the *European Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors* and the *European Convention on Social Security*.

4.2.2.2. European Social Charter

As a part of the right to social security, the *European Social Charter* (ESC) and the *European Social Charter (Revised)* (ESCR) require contracting parties to take steps, through the conclusion of bilateral and multilateral agreements, to ensure equal treatment between nationals and non-nationals of other contracting parties.¹¹⁷⁷ The scope of persons covered is influenced by the Appendix to the ESC. The Appendix to the ESC outlines the scope of persons protected as follows: “Without the prejudice to Article 12, paragraph 4..., the persons covered by Articles 1 to 17 include foreigners only insofar as they are nationals of other contracting parties lawfully resident or working regularly within the territory of the contracting party concerned...” The implication of this is that contracting parties which accept article 12(4) undertake to “guarantee equal treatment in the granting, maintenance and resumption of social security rights to the foreigners referred to in the appendix to the Charter, and also to guarantee that nationals of the other contracting parties who no longer reside on their territory but do not legally reside or regularly work there in past conserve the social security rights they acquired by virtue of the country’s social security legislation.”¹¹⁷⁸ The second point to be noted regarding persons covered is that article 12(4) is not based on any principle of reciprocity. This implies that “states which have accepted this provision undertake to respect the principles of Article 12 [paragraph] 4, even in respect of nationals of

¹¹⁷⁴ *European Treaty Series* No. 12 of 1953.

¹¹⁷⁵ *European Treaty Series* No. 13 of 1953.

¹¹⁷⁶ *European Treaty Series* No. 14 of 1953.

¹¹⁷⁷ Article 12(4)(a) of the *European Social Charter* and article 12(4)(a) of the *European Social Charter (Revised)*.

¹¹⁷⁸ Council of Europe *Social Protection in the European Social Charter* (Council of Europe Publishing (1999)) 41.

parties which have not accepted that paragraph.”¹¹⁷⁹ The third issue to be noted is that the scope of persons covered by the ESC and ESCR extends to refugees and stateless persons.¹¹⁸⁰ As regards the material scope, the principles encapsulated in article 12(4) apply to all branches of social security (including unemployment) existing in the social security system of a contracting party.¹¹⁸¹

The equal treatment between nationals and non-nationals provided for in article 12(4) obliges contracting parties to adjust their social security legislation so as to rid it of all forms of discrimination. In light of the equal treatment guarantee, contracting parties may not restrict entitlement to social security benefits to nationals only. The same prohibition applies to a situation whereby an entitlement to social benefits is restricted to certain categories of foreigners. In addition, contracting parties may not impose additional qualifying conditions on nationals of the other states alone.¹¹⁸² Apart from the equality of treatment, the ESC and the ESCR make provision for the principle of the “retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties.”¹¹⁸³ The aim of the retention of benefits principle is the avoidance of the loss of rights accrued under the social security law of one state merely for the reason that the beneficiary has relocated to another state. It is interesting to note that the ESC and ESCR do not draw a line of demarcation between “benefits paid by public funds and benefits acquired through previous employment or through the payment of social security contributions.”¹¹⁸⁴ In addition, the ESCR requires contracting parties to ensure the granting, maintenance and resumption of social security rights.¹¹⁸⁵ This shall be ensured through

¹¹⁷⁹ *Ibid.*

¹¹⁸⁰ Appendix to the *European Social Charter* and the Appendix to the *European Social Charter (Revised)*.

¹¹⁸¹ Council of Europe *Social Protection in the European Social Charter* (Council of Europe Publishing (1999)) 42.

¹¹⁸² *Ibid* 43.

¹¹⁸³ Article 12(4)(a) of the *European Social Charter* and article 12(4)(a) of the *European Social Charter (Revised)*.

¹¹⁸⁴ Otting A “International co-ordination of unemployment insurance” in a Conference Bundle for a Social Security Training Course on the Study of Co-ordinating Instruments in the Social Security Field, Hotel Palace, Sinaia, Romania, 25-28 March 2004 – accessed at <http://www.coe.int>.

¹¹⁸⁵ Article 12(4)(b) of the *European Social Charter* and of the *European Social Charter (Revised)*.

measures such as the accumulation of insurance or employment periods completed under the legislation of each of the contracting parties.¹¹⁸⁶

The following issues regarding the relationship between the ESC, ESCR and the other coordinating instruments (such as the *European Interim Agreements on Social Security Schemes*) deserve attention. When assessing compliance with article 12(4) of the ESC and the ESCR, the Committee of Experts does take other coordination instruments of the Council of Europe into account. Nonetheless, mere ratification of the coordination instruments does not mean that the contracting party is in compliance with article 12(4).¹¹⁸⁷ This is mainly due to the reason that the *European Interim Agreements on Social Security Schemes* are subordinate to other bilateral and multilateral agreements and they have not been adopted by all the contracting parties to the ESC and the ESCR.

4.2.2.3. European Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors

(a) Introduction

The *European Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors* gives effect to the principle of equal treatment between nationals and non-nationals of other contracting parties as regards social security.¹¹⁸⁸ In addition, it gives effect to the principle that nationals of the contracting parties should receive benefits derived from the bilateral and multilateral agreements on social security entered into by two or more contracting parties.¹¹⁸⁹ This instrument applies to all social security laws and regulations which were in force at the date of signature or may subsequently come into force in any part of the territory of the contracting party¹¹⁹⁰ and which relate to sickness, maternity and death

¹¹⁸⁶ *Ibid.*

¹¹⁸⁷ Council of Europe *Social Protection in the European Social Charter* (Council of Europe Publishing (1999)) 53.

¹¹⁸⁸ Preamble of the *European Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors*.

¹¹⁸⁹ *Ibid.*

¹¹⁹⁰ It must be kept in mind that the provisions of this instrument do not, however, limit the provisions of any national laws or regulations, international conventions, or bilateral or multilateral agreements which are more

(death grants), including medical benefits insofar as they are not subject to a needs test; employment injury; unemployment and family allowance.¹¹⁹¹ It furthermore applies to both contributory and non-contributory benefit schemes.¹¹⁹² Nevertheless, the *European Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors* does not apply to public assistance, special schemes for civil servants, or benefits in respect of war injuries or injuries due to foreign occupation.¹¹⁹³

(b) Principle of equality of treatment

The *European Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors* contains provisions for the principle of equal treatment as well as the conditions for such equality.¹¹⁹⁴ Firstly, it provides subjects of the contracting parties with a right to receive the benefits of the laws and regulations of any other contracting parties under the same conditions as if they were the nationals of the latter.¹¹⁹⁵ Secondly, it makes provision for a situation whereby laws and regulations of one of the contracting parties impose a restriction on the rights of a national of that party who was not born in its territory.¹¹⁹⁶ In such a case, the *European Agreement on Social Security other than Schemes for Old Age, Invalidity and*

favourable for the beneficiary (article 5 of the *European Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors*).

¹¹⁹¹ Article 1(1) of the *European Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors*.

¹¹⁹² Article 1(2).

¹¹⁹³ *Ibid.*

¹¹⁹⁴ Article 2. It should be mentioned that this article is subject to article 9 which provides every contracting party with the discretion to, at the time of making a notification to the Secretary General of the Council of Europe about the agreement it concluded, make a reservation in respect of the application of this *European Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors* to any law, regulation or agreement which is referred to in such notification. In addition, it provides contracting parties with the discretion to withdraw either in whole or in part any reservation made by it by a notification to that effect addressed to the Secretary General of the Council of Europe.

¹¹⁹⁵ Article 2(1) of the *European Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors*. This provision applies to the following situations: in the case of a benefit in respect of employment injury, provided that he resides in the territory of one of the contracting parties; in the case of any benefit other than a benefit in respect of employment injury, provided that he is ordinarily resident in the territory of the latter contracting party; in the case of benefit claimed in respect of sickness, maternity or unemployment, provided that he had become ordinarily resident in the territory of the latter contracting party before the first medical certification of the sickness, the presumed date of conception or the beginning of the unemployment, as the case may be; and in the case of a benefit provided under a non-contributory scheme, other than a benefit in respect of employment injury, provided that he has been resident for six months in the territory of the latter contracting party.

¹¹⁹⁶ Article 2(2).

Survivors directs that a national of any other of the contracting parties born in the territory of the latter shall be treated as if he were a national of the former contracting party born in its territory.¹¹⁹⁷ Further, it requires contracting parties, in a situation where in determining the right to a benefit the laws and regulations of a contracting party make any distinction which depends on the nationality of a child, to treat a child who is a national of any other contracting parties as if he were a national of the former contracting party.¹¹⁹⁸

- (c) Principle of the extension of the benefits from existing bilateral and multilateral agreements

Article 3 of the *European Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors* embodies the principle of the extension of the benefits from existing bilateral and multilateral agreements.¹¹⁹⁹ In accordance with this article, any agreement relating to social security laws and regulations shall apply to a national of any other of the contracting parties as if he were a national of one of the former parties.¹²⁰⁰

4.2.2.4. European Convention on Social Security

- (a) Introduction

The *European Convention on Social Security* (the Convention) applies to all laws governing, among others, the following branches of social security: sickness and maternity benefits,

¹¹⁹⁷ *Ibid.*

¹¹⁹⁸ Article 2(3).

¹¹⁹⁹ This article is, similar to article 2, subject to the provision of article 9. See fn 1194 for the provision of article 9.

¹²⁰⁰ The agreement applies insofar as it provides, in relation to those laws and regulations for determining under which laws and regulations a person should be insured; for maintaining acquired rights and rights in course of acquisition and, in particular, for adding together insurance periods and equivalent periods for the purpose of establishing the right to receive benefit and calculating the amount of benefit due; for paying benefit to persons residing in the territory of any one of the Parties to such agreement; and for supplementing and administering the provisions of such agreement referred to in this paragraph. It should be born in mind that the foregoing provisions do not apply to any provision of the agreement which concerns benefits provided in terms of a non-contributory scheme unless the national concerned has resided for six months in the territory of the contracting party under whose laws and regulations he claims benefit.

invalidity benefits, survivors' benefits and unemployment benefits.¹²⁰¹ In addition, it applies to all general social security schemes and special schemes, whether contributory or non-contributory, including employers' liability schemes in respect of, *inter alia*, the aforementioned benefits.¹²⁰² The Convention does not apply to social or medical assistance schemes, to benefit schemes for victims of war or its consequences, or to special schemes for civil servants or persons treated as such¹²⁰³ as well as legislation designed to give effect to a social security convention concluded between a contracting party and one or more other states.¹²⁰⁴ Notwithstanding the foregoing, the Convention contains basic principles crucial for social security coordination, particularly for unemployment benefits, such as equality of treatment, maintenance of acquired rights or those in the course of acquisition. It should be borne in mind that there are provisions of the Convention which are not immediately effective. These provisions require bilateral or multilateral agreements before they can be applicable. Examples of such provisions in the unemployment sphere include those that deal with the maintenance of entitlement to benefit on change of residence,¹²⁰⁵ unemployed persons who were not residing in the territory of the competent state during their last period of employment¹²⁰⁶ and special provisions in the legislation of certain states concerning the minimum duration for the payment of benefits.¹²⁰⁷

(b) Determination of the applicable legislation

The Convention is based on the principle that only one legislation shall be applicable. The aim of this principle is to avoid overlapping of insurance cover. The main principles to be followed in determining the legislation applicable include the following: employed persons are covered by the legislation of the state where they work, self-employed persons who follow their occupation in the territory of a contracting party are subject to the legislation of

¹²⁰¹ Article 2(1) of the *European Convention on Social Security*.

¹²⁰² Article 2(2).

¹²⁰³ Article 2(4). However, see the *Protocol to the European Convention on Social Security* (*European Treaty Series* No. 154 of 1994).

¹²⁰⁴ Article 2(5).

¹²⁰⁵ Article 52 of the *European Convention on Social Security*.

¹²⁰⁶ Article 53 of the *European Convention on Social Security*.

¹²⁰⁷ Article 54 of the *European Convention on Social Security*.

that party, and civil servants are subject to the legislation of the contracting party in whose administration they are employed.¹²⁰⁸

(c) Equality of treatment

The Convention affirms the principle of equality of treatment for nationals of the contracting parties, refugees and stateless persons under the social security legislation of each contracting party.¹²⁰⁹ Contracting parties may, however, in the case of non-contributory benefits, particularly where the amount of the benefit is not linked to periods of residence, require nationals of other contracting parties to comply with residence conditions.¹²¹⁰ There are, however, exceptions to the aforementioned principles in the case of, among others, employed persons sent to work in another state, employed persons working in international transport, and persons employed by frontier undertakings.¹²¹¹ Persons employed in frontier undertakings, for example, are subject to the legislation of the contracting party in whose territory the undertaking has its place of business.¹²¹²

(d) Maintenance of acquired rights or those in the course of acquisition

The general principle of acquisition, maintenance or recovery of entitlement to benefits is provided for in articles 10, 19, 28 and 49 of the *European Convention on Social Security*. This principle involves “adding together of periods to be taken into account for the acquisition, maintenance or recovery of entitlement to benefit when such entitlement is conditional upon the completion of a period of insurance, employment, other occupational activity or residence.”¹²¹³

¹²⁰⁸ Article 14.

¹²⁰⁹ The Preamble and article 8 of the *European Convention on Social Security*.

¹²¹⁰ “Explanatory Report on the European Convention on Social Security” – accessed at <http://conventions.coe.int/Treaty/en/Reports/Html/078.htm>.

¹²¹¹ See, for example, article 15(1).

¹²¹² Article 15(1)(d).

¹²¹³ *Ibid.* Provisions for the contingency of unemployment are contained in Chapter 5 of the Convention. These provisions include, among others, those that deal with acquisition, maintenance or recovery of entitlement to benefits (article 51); maintenance of entitlement to benefit on change of residence (article 52); and the calculation of benefits (article 55). It should be borne in mind that the provisions relating to unemployment as encapsulated in Chapter 5, with the exception of those concerning the adding together of periods of insurance or

4.2.2.5. Some observations

Provisions regarding the coordination of social security in the Council of Europe are contained in a variety of instruments. Each of these instruments has its own shortcomings. The ESC and ESCR make provision for equal treatment between nationals and non-nationals as well as the granting, maintenance and resumption of social security rights. Nonetheless, the ESC and ESCR are the so-called ‘menu type instruments’. Contracting parties can, to a large extent, ‘pick and choose’ which articles they want to accept. Consequently, not all contracting parties have accepted the provisions of article 12. This leads to an uneven application of the abovementioned principles of coordination contained in this article. The two *European Interim Agreements on Social Security Schemes*, on the other hand, are more concerned with the equality principle. Similarly to the ESC and the ESCR, not all member states of the European Council are bound by these agreements.

Furthermore, it is interesting to note that the *European Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors* does not require the “export of unemployment benefits abroad when an unemployed person moves or returns to another country.”¹²¹⁴ The *European Convention on Social Security*, which is an instrument that replaces the *European Interim Agreements on Social Security Schemes* in the case of those member states that have ratified the Convention, embraces basic principles of social security coordination such as equality of treatment, maintenance of acquired rights or those in the course of acquisition. Nonetheless, the number of member states bound by this instrument is rather small.¹²¹⁵ In addition, not all provisions of this treaty are directly and immediately

residence, are subject to the conclusion of bilateral or multilateral agreements. Such agreements should specify in particular the categories of persons to whom these provisions apply, the periods during which benefits are to be paid, and the arrangements for refund when benefits have been paid by the institution of one contracting party on behalf of the institution of another contracting party (article 56).

¹²¹⁴ Otting A “International co-ordination of unemployment insurance” in a Conference Bundle for a Social Security Training Course on the Study of Co-ordinating Instruments in the Social Security Field, Hotel Palace, Sinaia, Romania, 25-28 March 2004 – accessed at <http://www.coe.int>.

¹²¹⁵ The chart of signature and ratifications (*European Convention on Social Security*) accessed at the official website of the Council of Europe (<http://conventions.coe.int>) of 19 April 2006 shows that only 8 member states (namely, Austria, Belgium, Italy, Luxembourg, Netherlands, Portugal, Spain, and Turkey) have ratified the *European Convention on Social Security*.

applicable. The point is that there are provisions which are subject to the conclusion of bilateral and multilateral agreements.

4.2.3. Employment protection¹²¹⁶

4.2.3.1. Introduction

The ESCR embodies a variety of rights which are directly and indirectly important for employment protection. These rights include, *inter alia*, the right to work,¹²¹⁷ the right to just conditions of work,¹²¹⁸ the right to fair remuneration,¹²¹⁹ the right to organise,¹²²⁰ the right to bargain collectively,¹²²¹ the right to employed women to protection of maternity,¹²²² the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the ground of sex,¹²²³ the right to information and consultation,¹²²⁴ the right to protection in cases of termination of employment,¹²²⁵ the right of workers to the protection of their claims in the event of the insolvency of their employer,¹²²⁶ the right to dignity at work,¹²²⁷ the right of workers with family responsibility to equal opportunities and equal treatment,¹²²⁸ the right of workers' representatives to protection in the undertaking and

¹²¹⁶ In this section, reference is made to the *European Social Charter (Revised)* instead of the *European Social Charter*. The reason for this approach is that the *European Social Charter (Revised)*: “takes account of developments in labour law and social policies since the Charter was drawn up in 1961. The revised Charter is a comprehensive international treaty which brings together in a single instrument all the rights guaranteed in the Charter and the 1988 Additional Protocol, along with the amendments to these rights and the new rights adopted” (European Social Charter (Revised): Explanatory Report – accessed at <http://conventions.coe.int>). It should be borne in mind that the *European Social Charter (Revised)* does not provide for the denunciation of the *European Social Charter*. Nevertheless, if a contracting state accepts the provisions of the *European Social Charter (Revised)*, the corresponding provisions of the *European Social Charter* and its protocol cease to apply to that member state. The effect of this approach is that it prevents a situation whereby member states are simultaneously bound by undertakings at different levels (European Social Charter (Revised): Explanatory Report – accessed at <http://conventions.coe.int>).

¹²¹⁷ Article 1 of the *European Social Charter (Revised)*.

¹²¹⁸ Article 2.

¹²¹⁹ Article 4.

¹²²⁰ Article 5.

¹²²¹ Article 6.

¹²²² Article 8.

¹²²³ Article 20.

¹²²⁴ Article 21.

¹²²⁵ Article 24.

¹²²⁶ Article 25.

¹²²⁷ Article 26.

¹²²⁸ Article 27.

facilities to be accorded to them,¹²²⁹ and the right to information and consultation in collective redundancy procedures.¹²³⁰ It should be pointed out that contracting parties have a discretion not to ratify entire the ESCR. Part III of the ESCR permits the contracting parties to ratify at least six of the following nine articles of Part II of this ESCR: Articles 1 (the right to work), 5 (the right to organise), 6 (the right to bargain collectively), 7 (the right of children and young persons to protection), 12 (the right to social security), 13 (the right to social and medical assistance), 16 (the right of the family to social, legal and economic protection), 19 (the right of migrant workers and their families to protection and assistance) and 20 (the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex).¹²³¹ The employment protection measures provided in the ESCR, as embodied in some of the aforementioned rights, include: termination of employment for a valid reason, notice of termination as well as information and consultation.

4.2.3.2. Termination of employment for a valid reason

The ESCR makes provision for the right of all workers not to be dismissed without a valid reason.¹²³² A valid reason in this context is a reason connected to an employee's capacity or conduct or based on the operational requirements of the undertaking, establishment or service.¹²³³ It is not a valid reason (in view of the maternity protection the ESCR accords to employed women) for an employer to dismiss a female worker on the basis of such worker's pregnancy.¹²³⁴ Besides the foregoing, the ESCR provides workers whose employment has been terminated without a valid reason with a right to adequate compensation or other

¹²²⁹ Article 28.

¹²³⁰ Article 29.

¹²³¹ According to Birk (Birk R "Human rights at the workplace and the work of the Council of Europe" in Neal AC (ed) *The Changing Face of European Labour Law and Social Policy* (Kluwer (2004)) 55 at 57): "This system reflects the circumstance that economic and social progress within the membership of the Council of Europe was too diverse. The fulfilment of many economic and social rights required positive government intervention which was dependent upon the availability of economic resources. If the Charter was to be widely ratified, a system of variable acceptance was practically inevitable. Thus, [these]...articles reflect the fact that they were not chosen because they necessarily protect the...most important rights, but in order to achieve a balance between the different groups of rights in the Charter."

¹²³² Article 24(a).

¹²³³ *Ibid.*

¹²³⁴ Article 8(2).

appropriate relief.¹²³⁵ Furthermore, the ESCR requires contracting parties to ensure that workers who are of a view that their employment has been terminated without a valid reason shall have the right to appeal to an impartial body.¹²³⁶

4.2.3.3. Notice of termination

Apart from the termination of employment for a valid reason, the ESCR requires the contracting parties to recognise the right of all workers to a reasonable period of notice for termination of employment.¹²³⁷

4.2.3.4. Information and consultation

The right to information and consultation has been embodied in several articles of the ESCR. Firstly, the ESCR requires the contracting parties to promote joint consultation between workers and employers.¹²³⁸ The rationale behind such a step is to ensure the effective exercise of the right to collective bargaining.¹²³⁹ Secondly, it makes provision for the workers' right to be informed and consulted within the undertaking.¹²⁴⁰ In line with this right, workers should be consulted in good time on proposed decisions which could substantially affect their interests.¹²⁴¹ Such decisions include those that could have a significant impact on the employment situation in the undertaking.¹²⁴² In addition, the ESCR requires that employers inform and consult workers' representatives in good time prior to collective redundancies.¹²⁴³ The consultation should be on ways and means of avoiding collective redundancies or limiting their occurrences and mitigating their consequences.¹²⁴⁴ Such ways

¹²³⁵ Article 24(b).

¹²³⁶ Article 24.

¹²³⁷ Article 4(4).

¹²³⁸ Article 6(1).

¹²³⁹ Article 6.

¹²⁴⁰ Article 21

¹²⁴¹ Article 21(b).

¹²⁴² *Ibid.*

¹²⁴³ Article 29.

¹²⁴⁴ *Ibid.*

and means, as the ESCR provides, could include social measures aimed at the redeployment or retraining of the workers affected.¹²⁴⁵

4.2.3.5. Some observations

The employment protection principles contained in the ESCR are to a great extent based on those found in international instruments – particularly those of the ILO. For instance, the protection afforded to workers in cases of termination of employment has been inspired by the *Termination of Employment Convention* (158 of 1982). Whereas the provision relating to the right of workers to the protection of their claims in the event of the insolvency of the employer has been inspired by the (ILO) *Protection of Workers' Claims (Employers' Insolvency)* (173 of 1982) and the European Community Directive 80/987 on the approximation of the laws of the member states concerning the protection of employees in the event of the insolvency of their employer.¹²⁴⁶ Despite that, the ESCR has its own shortcomings. For example, the ESCR is criticised for the fact that it “is not a self-executing instrument, and it does not, for instance, create obligations for an employer.”¹²⁴⁷ Contracting parties need to integrate the provisions of the ESCR into or change their domestic legislation so as to fulfil the ECSR obligation. Another point of criticism levelled against the ESCR is that it does not guarantee rights directly. It simply requires the contracting parties to give undertakings which are expected to lead to the ‘effective exercise’ of the right in question.¹²⁴⁸ This is evident from the phrase at the beginning the each provision contained in Part II of the ECSR which reads “With a view to ensuring the effective exercise of the right to [or of]..., the Parties undertake.”

¹²⁴⁵ *Ibid.*

¹²⁴⁶ European Social Charter (Revised): Explanatory Report – accessed at <http://conventions.coe.int>.

¹²⁴⁷ Birk R “Human rights at the workplace and the work of the Council of Europe” in Neal AC (ed) *The Changing Face of European Labour Law and Social Policy* (Kluwer (2004)) 55 at 56.

¹²⁴⁸ Harries DJ “The European Social Charter” (1964)13 *International and Comparative Law Quarterly* 1076 at 1080.

5. SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

5.1. Introduction

5.1.1. Aims and purpose of the Southern African Development Community

The Southern African Development Community (the SADC) is a regional organisation in Southern Africa. It comprises fourteen southern African countries, namely: Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. SADC is a relatively young organisation. It evolved from the Southern African Development Coordination Conference (the SADCC). SADCC was established in 1980 by Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. The primary aim of SADCC was to achieve regional cooperation among its members. Its ultimate goal was to reduce economic, technological and transport dependence on the then apartheid South Africa.¹²⁴⁹ The end of apartheid saw SADCC transforming into a larger (in terms of the number of countries) development-oriented regional organisation¹²⁵⁰ in southern Africa called SADC.

The objectives of SADC, as expounded in the SADC Treaty (as amended) (i.e. the treaty establishing SADC),¹²⁵¹ are to: achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of southern Africa and support the socially disadvantaged through regional integration; evolve common political values, systems

¹²⁴⁹ See Osode P “The Southern African Development Community in legal historical perspective” (2003) 28 *Journal for Juridical Science* 1 at 2-4, Dikotla M and Verhoef G “The development of trade in SADCC: The first decade of trade in the new regional formation, 1980 – 1989” Paper presented at the International Economic History Congress, Buenos Aires, 23 July 2002 – accessed at <http://www.eh.net/XVIICongress/Papers/Dikotla.pdf>, Schoeman M “From SADCC to SADC and beyond: The politics of economic integration” Paper presented at the International Economic History Congress, Buenos Aires, 23 July 2002 – accessed at <http://www.eh.net/XVIICongress/Papers/Schoeman.pdf>, Morgan R “Social security in the SADCC states of southern Africa: Social-welfare programmes and the reduction of household vulnerability” in Ahmad E *et al* (eds) *Social Security in Developing Countries* (Claredon (1991)) 415, Hill CR “Regional co-operation in southern Africa” (1983) 82 *African Affairs* 215 and Boyd JB “A subsystemic analysis of the Southern African Development Coordination Conference” (1985) 28 *African Studies Review* 46.

¹²⁵⁰ See the Preamble and article 1 of the SADC Treaty.

¹²⁵¹ The treaty of the SADC (as amended) came into effect on 12 September 2000.

and institutions; promote and defend peace and security; promote self-sustaining development on the basis of collective self-reliance, and the interdependence of member states; achieve complementarity between national and regional strategies and programmes; promote and maximise productive employment and utilisation of resources of the SADC region; achieve sustainable utilisation of natural resources and effective protection of the environment; and strengthen and consolidate the long-standing historical, social and cultural affinities and links among the people of the region.¹²⁵² In order to realise its objectives, SADC undertakes to: harmonise political and socio-economic policies and plans of member states; encourage the people of the region and their institutions to take initiatives to develop economic, social and cultural ties across the region, and to participate fully in the implementation of the programmes and projects of SADC; create appropriate institutions and mechanisms for the mobilisation of requisite resources for the implementation of programmes and operations of SADC and its institutions;¹²⁵³ develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the region generally, among member states; promote the development of human resources; promote the development, transfer and mastery of technology; improve economic management and performance through regional co-operation; promote the coordination and harmonisation of the international relations of member states; secure international understanding, co-operation and support, and mobilise the inflow of public and private resources into the region; and develop such other activities as member states may decide in furtherance of the objectives of SADC Treaty.¹²⁵⁴ The preceding objectives of SADC do, to a certain extent, highlight some of the problems and challenges, relevant to this study, facing the region. For instance, SADC is rated as one of the poorest regions in the world. More than 40% of the region's population, i.e. 76 million people, is estimated to be living below the international poverty line of US\$1 per day whereas the number of those who live on less than US\$2 per day is estimated to constitute around 70% of

¹²⁵² Article 5(1) of the SADC Treaty.

¹²⁵³ The institutions of SADC are listed in Chapter Five of the SADC Treaty (as amended) as the Summit of the Heads of State of Government or Government (article 10), the Organ on Politics, Defence and Security Co-operation (article 10A), the Council of Ministers (article 11), the Integrated Committee of Ministers (article 12), the Standing Committee of Officials (article 13), the Secretariat (article 14) and the Tribunal (article 16) and the SADC National Committees (article 16A).

¹²⁵⁴ Article 5(2) of the SADC Treaty.

the SADC population.¹²⁵⁵ Furthermore, the SADC poverty situation is aggravated by a variety of factors which include, among others, the following: recent El Nino related cycles of draughts and floods,¹²⁵⁶ political instability,¹²⁵⁷ HIV/AIDS¹²⁵⁸ and other communicable diseases such as malaria,¹²⁵⁹ and under-employment and unemployment.¹²⁶⁰

5.1.2. Southern African Development Community social security instruments

Specific (un)employment protection (-related) provisions in the SADC region can, for the most part, be found in the *Charter of Fundamental Rights in the SADC* (the SADC Social Charter)¹²⁶¹ and the *Draft Code on Social Security in the SADC* (2004). The SADC Social

¹²⁵⁵ SADC *Regional Indicative Strategic Development Plan (RISDP)* – accessed at <http://www.sadc.int>.

¹²⁵⁶ According to the SADC *Southern African Development Community Annual Report 2002-2003* (accessed at <http://www.sadc.int>): “In 2002, cycles of droughts and floods generated an acute humanitarian crisis in the region affecting over 15.2 million people, mainly in Angola, Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe.”

¹²⁵⁷ The skirmishes still experienced (here and there) in the Democratic Republic of the Congo, for example, impact negatively on millions of persons in the region.

¹²⁵⁸ See Haacker M *The Economic Consequences of HIV/AIDS in Southern Africa* (IMF Working Paper WP/02/38 (2002)), Mutangadura GB “Women and AIDS in southern Africa: The case of Zimbabwe and its policy implications” (2001) 1 *Jenda: A Journal of Culture and African Women Studies* 1 and Cohen D “Poverty and HIV/AIDS in Sub-Saharan Africa” SEPED Conference Paper Series 7 – accessed at http://www.undp.org/publications/conf_pub.htm, World Bank *Botswana – Selected Development Impact of HIV/AIDS* (Report No. 22043-BT (2001)), World Bank *Lesotho – The Developmental Impact of HIV/AIDS: Selected Issues and Options* (Report No. 21103-LSO (2000)), Fluitman F *Working, but not well: Notes on the Nature and Extent of Employment Problems in Sub-Saharan Africa* (International Training Centre of the International Labour Organisation (2001)) 28-31, World Bank *Namibia – Selected Development Impact of HIV/AIDS* (Report No. 22046-Nam (2001)), World Bank *Swaziland – Selected Development Impact of HIV/AIDS* (Report No. 22044-SW (2000)) and Arndt C and Lewis JD *The Macro Implications of HIV/AIDS in South Africa: A Preliminary Assessment* (World Bank Africa Region Working Paper Series No. 9 (2000)).

¹²⁵⁹ SADC *Southern African Development Community Annual Report 2002-2003* – accessed at <http://www.sadc.int>.

¹²⁶⁰ Development Policy Research Unit (DPRU) *Human Development Indicators in the SADC Region* (DPRU Policy Brief No. 01/P13 (2001)) 4. Also see Mhone GCZ “Enclavity and Constrained Labour Absorptive Capacity in Southern African Economies” Draft paper prepared for the discussion at the UNRISD meeting on “The Need to Rethink Development Economics”, 7-8 September 2001, Cape Town, South Africa.

¹²⁶¹ The Charter of Fundamental Rights in the SADC (SADC Social Charter) (available at <http://www.sadc.int>) entered into force on 26 August 2003. This instrument which expands on the objectives of the SADC Treaty, aims to “facilitate, through close and active consultations among social partners and in a spirit conducive to harmonious labour relations, the accomplishment of the following objectives: ensure the retention of the tripartite structure of the three social partners, namely: governments, organisations of employers and organisations of workers; promote the formulation and harmonisation of legal, economic and social policies and programmes, which contribute to the creation of productive employment opportunities and generation of incomes, in Member States; promote labour policies, practices and measures, which facilitate labour mobility, remove distortions in labour markets and enhance industrial harmony and increase productivity, in Member States; provide a framework for regional co-operation in the collection and dissemination of labour market information; promote the establishment and harmonisation of social security schemes; harmonise regulations relating to health and safety standards at work places across the Region; and promote the development of

Charter makes provision for, among others, freedom of association and collective bargaining;¹²⁶² equal treatment for men and women;¹²⁶³ social protection;¹²⁶⁴ information,

institutional capacities as well as vocational and technical skills in the Region” (article 2(1) of the *SADC Social Charter*).

¹²⁶² The SADC Social Charter provides employers and workers of the region with the right to form employers’ associations or trade unions (article 4(a)). Alongside this right, it provides every employer and every worker with a freedom to join an employers’ associations or trade union (article 4(b)). The aforementioned employers’ associations’ and trade unions have the right to negotiate and conclude collective agreements (article 4(c)). Most countries of the region have a general freedom of association in their constitutions (e.g. Angola (s 32 of the Constitution of Angola), Botswana (ss 3(b) and 13(1) of the Constitution of Botswana), Madagascar (ss 10 and 14 of the Constitution of Madagascar), Malawi (s 32 of the Constitution of Malawi), Mauritius (ss 3(b) and 13(1) of the Constitution of Mauritius), Mozambique (s 76 of the Constitution of Mozambique), Namibia (s 21(1)(e) of the Constitution of Namibia), South Africa (ss 17, 18 and 30 of the Constitution of South Africa), Swaziland (s 18 of the Constitution of Swaziland), Tanzania (s 20 of the Constitution of Tanzania), Zambia (s 21(1) of the Constitution of Zambia) and Zimbabwe (s 21 of the Constitution of Zimbabwe)) and a labour-related freedom of association as well as collective bargaining in their employment laws (e.g. South Africa (Chapters II and IV of the LRA), Namibia (Part VII and VIII of the *Labour Act*), Lesotho (Part XIII and XIV of the *Labour Code Order*), Botswana (Part V of the *Trade Disputes Act* 15 of 2004) and Tanzania (Part II (Sub-Part D), IV, V and VI of the *Employment and Labour Relations Act*)). Furthermore, the SADC Social Charter makes provision for the right to resort to collective action in the event of a dispute remaining unresolved (article 4(e)) and organisational rights for representative unions (article 4(f)). These organisational rights include the right of access to employer premises for union purposes subject to agreed procedures, the right to deduct trade union dues from member’s wages, the right to elect trade union representatives, the right to choose and appoint full-time trade union officials, the right of trade union representatives to education and training leave, and the right of the trade unions to disclosure of information (article 4(f)(i)-(vi)). Similar organisational rights can be found in the labour laws of certain member states (see, for example, Part VII of the *Labour Act* (Namibia), Chapter III (Part A) of the LRA (South Africa) and Part V of the *Employment and Labour Relations Act* (Tanzania)). The SADC Social Charter appreciates the unique nature of essential services and to this end it requires governments, employers and trade unions in the region to develop appropriate and easily accessible machinery for quick resolution of disputes in essential services (article 4(g)-(h)). Apart from the foregoing, the SADC Social Charter extends freedom of association and collective bargaining rights to all areas including export processing zones (article 4(i)). The extension of freedom of association and collective bargaining rights to export processing zones is to be welcomed. This is for the reason that export processing zones are often exempted from national labour laws (see, for example, Gender, Poverty and Employment (GPE) Regional Brief – Southern Africa *Women in Wage Employment* (ILO (2003)) 6-7 and Endresen S and Jauch H “Export Processing Zones (EPZs): A success story?” (International Labour Resource and Information Group) – accessed at <http://www.larri.com.na>).

¹²⁶³ The SADC Social Charter directs member states to create an enabling environment consistent with the ILO Conventions on discrimination and equality and other relevant instruments so that: gender equity, equal treatment and opportunities for men and women are ensured; equal opportunities for both men and women shall apply, in particular, to access to employment, remuneration, working conditions, social protection, education, vocational training and career development; and reasonable measures are developed to enable men and women to reconcile their occupational and family obligations (article 6). Most countries of the region have enshrined the right to equality in their respective constitutions (e.g. Angola (s 18 of the Constitution of Angola), Botswana (s 3 of the Constitution of Botswana), Lesotho (ss 4 and 19 of the Constitution of Lesotho), Madagascar (ss 17, 8 and 28 of the Constitution of Madagascar), Malawi (ss 4, 12 and 20 of the Constitution of Malawi), Mauritius (ss 3 and 16 of the Constitution of Mauritius), Mozambique (s 66 of the Constitution of Mozambique), Namibia (s 10 of the Constitution of Namibia), South Africa (s 9 of the Constitution of South Africa), Tanzania (ss 12 and 13 of the Constitution of Tanzania), Zambia (s 23 of the Constitution of Zambia) and Zimbabwe (s 23 of the Constitution of Zimbabwe)). In addition, the right to equality is contained in various national laws which include labour laws (e.g. s 6 of the *Employment Equity Act* (South Africa)).

¹²⁶⁴ Article 10 of the SADC Social Charter.

consultation and participation of workers;¹²⁶⁵ and freedom to choose and engage in an occupation.¹²⁶⁶ In addition, the SADC Social Charter directs member states to take appropriate action to ratify and implement relevant ILO instruments.¹²⁶⁷ The *Draft Code on Social Security in the SADC*, on the other hand, is aimed at providing “Member States with strategic direction and guidelines in the development and improvement of social security schemes to enhance the welfare of the people of the SADC region.”¹²⁶⁸ Although this instrument is still a draft, it provides for, *inter alia*, the right to social security,¹²⁶⁹ social assistance, social services and social allowances, social insurance,¹²⁷⁰ unemployment and under-employment,¹²⁷¹ migrants, foreign workers and refugees,¹²⁷² prevention and integration measures,¹²⁷³ and a social protection framework.¹²⁷⁴ The SADC Social Charter and the *Draft Code on Social Security in the SADC*, article 22(1) of the SADC Treaty require member states to conclude Protocols in each area of co-operation (which include: social and human development and special programmes as well as social welfare¹²⁷⁵) and institutional mechanisms for co-operation and integration. Nevertheless, an analysis of the provisions of the SADC Protocols¹²⁷⁶ shows that “social protection issues are not always accorded the

¹²⁶⁵ The SADC Social Charter requires member states to create an enabling environment so as to ensure that: industrial and workplace democracy is promoted; workers shall have the right to information, consult and participate; information, consultation and participation of workers is developed along appropriate lines and similar practices are encouraged in all member states; and information, consultation and participation apply especially in companies or groups of companies having establishments or companies in two or more member states in the region (article 13).

¹²⁶⁶ Article 14(a) of the SADC Social Charter.

¹²⁶⁷ Article 5(b) of the SADC Social Charter.

¹²⁶⁸ Clause 2 of the *Draft Code on Social Security in the SADC*.

¹²⁶⁹ Clause 3 of the *Draft Code on Social Security in the SADC*.

¹²⁷⁰ Clause 5 of the *Draft Code on Social Security in the SADC*.

¹²⁷¹ Clause 10 of the *Draft Code on Social Security in the SADC*.

¹²⁷² Clause 16 of the *Draft Code on Social Security in the SADC*.

¹²⁷³ Clause 18 of the *Draft Code on Social Security in the SADC*.

¹²⁷⁴ Clause 19 of the *Draft Code on Social Security in the SADC*.

¹²⁷⁵ Article 21(3) of the SADC Treaty.

¹²⁷⁶ SADC Protocols include: the Protocol on Trade (entered into force on 7 August 2000); the Protocol on Wildlife Conservation and Law Enforcement (entered into force on 30 November 2003); the Protocol on Energy (entered into force on 17 April 1998); the Protocol on Transport, Communications and Meteorology (entered into force on 6 July 1998); the Protocol on Mining (entered into force on 10 February 2000); the Protocol on Health (entered into force on 14 August 2004); the Protocol on Education and Training (entered into force on 31 July, 2000); the Protocol on Shared Watercourse Systems (entered into force on 22 September 2003); the Protocol on the Development of Tourism (entered into force on 26 November 2002); and the Protocol on Combating Illicit Drugs (entered into force on 20 March 1999).

priority they are supposed to enjoy in terms of the aims, purposes and provisions of the Treaty.”¹²⁷⁷

5.1.3. Implementation and monitoring of social security instruments within the Southern African Development Community structures

The Tribunal, which is one of the organs of the SADC, is assigned the power to ensure adherence to and the proper interpretation of the provisions of the SADC Treaty and subsidiary instruments and to adjudicate upon disputes as may be referred to it.¹²⁷⁸ In addition, the Tribunal has the authority to provide advisory opinions on such matters as the Summit or the Council may refer to it.¹²⁷⁹ Furthermore its decisions are final and binding.¹²⁸⁰ The *Charter of Fundamental Rights in the SADC*, on the other hand, places the responsibility for its implementation on the national tripartite institutions and regional structures. In addition, the *Charter of Fundamental Rights in the SADC* requires the aforesaid regional structures to promote social legislation and equitable growth within the SADC region and prevent its non-implementation. Furthermore, all member states are obliged to submit regular progress reports to the Secretariat. Additionally, it imposes a duty on member states to consult the most representative organisation of employers and workers in the preparation of the reports. As far as the *Draft Code on Social Security in the SADC*, this instrument obliges the Integrated Committee of Ministers to establish an Independent Committee of Experts within the relevant SADC structures to monitor compliance with the *Draft Code on Social Security in the SADC* and make recommendations to the relevant SADC structures and the respective national structures on the progressive attainment of its provisions.¹²⁸¹

¹²⁷⁷ Olivier M “Regional social security: Are innovative developments in Southern Africa relevant to the European Context?” in Pieters D (ed) *European Social Security and Global Politics* (Kluwer (2003)) 95 at 109.

¹²⁷⁸ Article 16(1) of the SADC Treaty and article 14 of the Protocol on the Tribunal and Rules of Procedure (entered into force upon the adoption of the Agreement Amending the Treaty of SADC on the 14 August 2001).

¹²⁷⁹ Article 16(4) of the SADC Treaty and article 20 of the Protocol on the Tribunal and Rules of Procedure.

¹²⁸⁰ Article 16(5) of the SADC Treaty and article 32(4) of the Protocol on the Tribunal and Rules of Procedure.

¹²⁸¹ Clause 20(3) of the *Draft Code on Social Security in the SADC*.

5.1.4. Some observations

SADC is an organisation of a wholly inter-governmental character. This is evident mainly from the fact that SADC is based on the principle of the sovereign equality of all member states. SADC's objectives include regional integration and the progressive elimination of obstacles to the free movement of, among others, labour and the people of the region. These objectives have some social security implications. One of those implications is that to facilitate these objectives, the region requires, *inter alia*, a social security coordination institutional framework.¹²⁸² The point is that it would be useless to strive towards regional integration and free movement of labour and people in a social-security vacuum as this could result in workers and persons travelling or working in the region losing their social security entitlements. The absence of or limited social security coordination could undermine efforts to integrate the region or promote free movement. Secondly, SADC is a relatively new organisation. It is not surprising that its "structures are not yet well developed and the SADC instruments, in particular the SADC Protocols, present one with a more or less embryonic picture of a truly integrated regional system." Nevertheless, SADC should pay more attention on the development of regional social security standards. Instruments geared at the realisation of the aims and objective of the SADC Treaty in so as far as social protection is concerned are as important as those intended at economic integration and co-operation.

5.2. Southern African Development Community standards and unemployment protection

5.2.1. Right to social security – Constitutional (and statutory embodiment) in SADC

SADC countries are, in accordance with the SADC Social Charter, required to create an enabling environment so that every worker in the region shall have the right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate

¹²⁸² See Olivier M "Social security for migrants: Does the European Union framework provide lessons for developments in SADC?" in Berghman J *et al* (eds) *Social Security in Transition* (Kluwer (2002)) 107 at 118.

social security benefits.¹²⁸³ In addition the SADC Social Charter requires the SADC countries to ratify and implement relevant international instruments.¹²⁸⁴ The *Draft Code on Social Security in the SADC*, on the other hand, provides everyone in SADC with the right to social security.¹²⁸⁵ It requires member states to establish and maintain a social security system at a satisfactory level at least to that required for ratification of the *Social Security (Minimum Standards) Convention*.¹²⁸⁶ In view of the foregoing pronouncements, it is appropriate to point out that the number of ratifications by SADC countries of the eight officially current conventions in the field of social security is unsatisfactory.¹²⁸⁷ Out of fourteen member states of the SADC, as of 02 May 2006, the Democratic Republic of the Congo has ratified three of the current conventions.¹²⁸⁸ Madagascar, as of 02 May 2006, follows the Democratic Republic of the Congo with one ratification of the current conventions.¹²⁸⁹ It is indeed imperative for SADC member states to ratify these important conventions, not only for their importance in the field of social security – particularly in the area of unemployment protection, but also for the reason that new social security international standards now must take the content of the eight current Conventions into account before they are adopted.¹²⁹⁰

5.2.2. Prevention and integration measures

The *Draft Code on Social Security in the SADC* encourages member states to make sure that their systems adequately integrate sufficient preventive and (re)integrative measures and are not primarily compensation-focused.¹²⁹¹ It provides further that (re)integration should at least be socially and in the labour market so as to encourage self-reliance and to support human

¹²⁸³ Article 10(1) of the SADC Social Charter.

¹²⁸⁴ Article 5 of the SADC Social Charter.

¹²⁸⁵ Clause 3(1) of the *Draft Code on Social Security in the SADC*.

¹²⁸⁶ Clause 3(3) of the *Draft Code on Social Security in the SADC*.

¹²⁸⁷ See paragraph 2.1.2. in chapter 4 for a list of the officially current international conventions in the area of social security.

¹²⁸⁸ That is the *Social Security (Minimum Standards) Convention*, the *Equality of Treatment (Social Security) Convention* and the *Employment Injury Benefits Convention*.

¹²⁸⁹ I.e. the *Equality of Treatment (Social Security) Convention*.

¹²⁹⁰ Javillier J-C “The impact of international social security standards” Conference on the ISSA Initiative, Vancouver, Canada, 10-12 September 2002.

¹²⁹¹ Clause 18(1) of the *Draft Code on Social Security in the SADC*.

dignity.¹²⁹² The SADC Social Charter, on the other hand, entitles persons who are unable to enter or re-enter the labour market and have no means of subsistence to sufficient resources and social assistance.¹²⁹³ This is, it is opined, a right step towards much needed comprehensive social protection, particularly in the area of unemployment protection in the region. Furthermore, by providing for the preventive and (re)integrative measures, these instruments break away from a practice whereby social security schemes (particularly unemployment protection schemes) concern themselves only with the payment of benefits. Additionally, this is in tune with international standards – particularly those of the ILO.

5.2.3. Undeveloped and underdeveloped social protection schemes

Social protection in SADC is, generally speaking, undeveloped or underdeveloped.¹²⁹⁴ Additionally, social protection schemes tend to exclude and marginalise many needy groups and categories of persons.¹²⁹⁵ The *Draft Code on Social Security in the SADC* contains provisions which, it is opined, are directed at addressing the aforesaid problems. Firstly, this instrument enjoins member states to raise progressively their social security systems to a higher level, including the meaningful coverage of everyone in terms of the system.¹²⁹⁶ Nonetheless, the realisation of this duty is subject to the realities and level of development in the member states. It should be noted that that the *Draft Code on Social Security in the SADC* embraces the principle of variable geometry, where a group of member states could move faster on certain activities and the experiences learnt replicated in other members states, as one of the principles underlying the development of sound social security systems in SADC member states.¹²⁹⁷ The *Draft Code on Social Security in the SADC* obliges member states to establish social insurance schemes and progressively expand the coverage and impact of

¹²⁹² Clause 18(2) of the *Draft Code on Social Security in the SADC*.

¹²⁹³ Article 10(2) of the SADC Social Charter.

¹²⁹⁴ Olivier MP and Mpedi LG “Co-ordination and integration of social security in the SADC region: Developing the Social Dimension of Economic Co-operation and Integration” (2003) 28 *Journal for Juridical Science* 10 at 12.

¹²⁹⁵ Olivier MP and Mpedi LG “Co-ordination and integration of social security in the SADC region: Developing the Social Dimension of Economic Co-operation and Integration” (2003) 28 *Journal for Juridical Science* 10 at 13.

¹²⁹⁶ Clause 3(4) of the *Draft Code on Social Security in the SADC*.

¹²⁹⁷ See *Draft SADC Code on Social Security: Background Document*.

these schemes.¹²⁹⁸ This is crucial, particularly when one notes the dearth of social insurance instruments geared at the protection of unemployment in the region. Where they exist, their scope of coverage tends to be limited. South Africa is the case in point.¹²⁹⁹ Furthermore, the *Draft Code on Social Security in the SADC* instructs member states to extend social insurance to the entire working population,¹³⁰⁰ provide and regulate social insurance mechanisms for the informal economy,¹³⁰¹ and encourage and regulate private and public sector participation.¹³⁰² This is to be welcomed, for the reason that often in the region not all working persons are covered by the social insurance schemes. Reasons for this situation range from the lack of a statutory duty to participate to the fact that some workers do not fall within the narrow definition of employee as contained in labour laws. In addition, by virtue of the aforementioned provisions, a majority of individuals in the region who eke a living in the informal economy would find solace in the social insurance schemes of the respective countries where they are employed. This is important in view of the fact that most of these workers are currently excluded and marginalised from most social insurance schemes including unemployment protection schemes.

5.2.4. Coordination of social protection schemes

There is a serious lack of coordination of social protection schemes in the region.¹³⁰³ The lack of cross-border social security arrangements in SADC invariably leads to loss of social security benefits as SADC nationals change jobs and residence in the region. The *Draft Code on Social Security in the SADC* calls upon member states to strive towards the free movement of persons and the progressive reduction of immigration controls.¹³⁰⁴ The *Draft Code on Social Security in the SADC* requires member states to extend access to social

¹²⁹⁸ Clause 5(1) of the *Draft Code on Social Security in the SADC*.

¹²⁹⁹ See chapter 3.

¹³⁰⁰ Clause 5(4) of the *Draft Code on Social Security in the SADC*.

¹³⁰¹ Clause 5(5) of the *Draft Code on Social Security in the SADC*.

¹³⁰² Clause 5(6) of the *Draft Code on Social Security in the SADC*.

¹³⁰³ Olivier MP and Mpedi LG “Co-ordination and integration of social security in the SADC region: Developing the Social Dimension of Economic Co-operation and Integration” (2003) 28 *Journal for Juridical Science* 10 at 13.

¹³⁰⁴ Article 16(1) of the *Draft Code on Social Security in the SADC*. It should be mentioned that there is a SADC Draft Protocol on the Freedom of Movement of Persons (1998). See Oucho JO and Crush J “Contra free movement: South Africa and the SADC migration Protocols” (2002) 48 *Africa Today* 139 and Mengelkoch S *The Right to Work in SADC Countries: Towards Free Movement of Labour in Southern Africa* (Nomos (2000)).

security to immigrations legally employed in their territories through social security coordination principles which should be contained in both national laws of member states and in bi- or multilateral arrangements between member states. The aforesaid principles are as following: migrant workers should be able to participate in the social security schemes of the host country, migrant workers should enjoy equal treatment with citizens within the social security system of the host country and, there should be an aggregation of insurance periods and the maintenance of acquired rights and benefits between similar schemes in different member states, member states should ensure the facilitation of exportability of benefits, including the payment of benefits in the host country, member states should identify the applicable law for purposes of the implementation of the above principles, and member states should ensure coverage of self-employed migrant workers on the same basis as employed migrants.¹³⁰⁵ Provision is also made for illegal residents, undocumented migrants and refugees. Illegal residents and undocumented migrants should be provided with basic minimum protection and should enjoy coverage according to local laws.¹³⁰⁶ As regards the refugees, the *Draft Code on Social Security in the SADC* directs that social protection should be extended to this category of persons in accordance with the provisions of international and regional instruments.¹³⁰⁷

5.2.5. Some observations

Firstly, the ratification record of SADC member states of the officially current conventions in the field of social security is unsatisfactory. Member states should be encouraged to ratify these important instruments. Secondly, preventive and (re)integrative measures are a part and parcel of a social security system. Thus, the call by the SADC Social Charter and the *Draft Code on Social Security in the SADC* for the introduction of these measures is to be welcomed. This is also in line with the ILO's standards. Furthermore, undeveloped and under-developed social security systems are some of the undesirable features of the SADC social security system. Accordingly, attempts to address this situation should be encouraged. Lastly, social security coordination is an integral part of regional integration and the free

¹³⁰⁵ Clause 16(2) of the *Draft Code on Social Security in the SADC*.

¹³⁰⁶ Clause 16(3) of the *Draft Code on Social Security in the SADC*.

¹³⁰⁷ Clause 16(4) of the *Draft Code on Social Security in the SADC*.

movement labour and persons. To this end, the provisions in the *Draft Code on Social Security in the SADC* on these matters are to be welcomed.

5.3. Unemployment protection measures in SADC countries

SADC member states have divergent social security systems and/or schemes to cushion unemployment (and related) risks. It is for this reason that there is a variety of unemployment protection measures, where such measures are available, in the SADC region. The most typical of these measures are contributory schemes, non-contributory schemes, labour intensive programmes and informal social security arrangements.

5.3.1. Contributory schemes

Contributory schemes, making provision for unemployment protection benefits, are relatively uncommon in the region. South Africa does, however, operate a social insurance scheme which provides short-term benefits such as unemployment benefits, illness benefits, maternity benefits, adoption benefits and dependant's benefits. Apart from South Africa, there are other countries (e.g. Namibia) which operate insurance-based schemes which provide short-term benefits such as maternity benefits. Several points of criticism may be levelled against contributory schemes in the region. Firstly, their scope of coverage is often limited to those who work in the formal sector. Consequently, they exclude, among others, informal economy workers. Secondly, the monetary value of the benefits they provide is low. Furthermore, benefits provided under these schemes are largely available only for a short period. Moreover, participation in these schemes is usually restricted to nationals.¹³⁰⁸

5.3.2. Non-contributory schemes

Two types of non-contributory schemes can be found in the region. These types are universal and means-tested. Universal schemes can be found in countries such as Mauritius, Namibia

¹³⁰⁸ The South African unemployment insurance system does not cover non-citizen fixed-term contract workers. (s 3(d) of the *Unemployment Insurance Act* 2001).

and Botswana. South Africa, on the other hand, runs a means-tested social assistance programme. Although these schemes are not directly aimed at unemployment protection, with the exception of Mauritius which has an additional non-contributory benefit directly aimed at unemployment called Unemployment Hardship Relief, they (in most instances) nonetheless minimise the impact and effect of unemployment on individuals and families. Notwithstanding the foregoing, there are a sizeable number of SADC countries which are yet to introduce or have not so well developed non-contributory schemes.¹³⁰⁹ The reasons behind such a state of affairs are diverse and vary from one SADC country to another. But it would appear that the lack of resources ranks supreme.

5.3.3. Labour intensive programmes

A sizeable number of SADC countries introduced labour intensive programmes as a measure to provide, *inter alia*, a temporary income to the poor. These countries include, among others, the following: Botswana, Lesotho, Mozambique, Namibia, South Africa,¹³¹⁰ Zambia and Zimbabwe. The problem with these labour intensive programmes is that:

“...even where women and girls benefit reasonably even-handedly from the [labour intensive projects], the effect is usually short-lived. Few projects appear to have a clear linkage to sustainable poverty reduction objectives, and some, such as the Botswana public works programmes, have been criticised for increasing women’s workload while paying them below minimum wages.”¹³¹¹

Furthermore, “[w]hile labour-intensive public works programmes provide impoverished communities and families with some relief, they leave intact the structural barriers that force most economically active adults, and particularly women, into forms of low-earning employment or self-employment without security or protection.”¹³¹²

¹³⁰⁹ E.g. Angola, Lesotho, Madagascar, Malawi, Swaziland, Tanzania, Zambia and Zimbabwe.

¹³¹⁰ See paragraph 2.3.1. in chapter 3.

¹³¹¹ Gender, Poverty and Employment (GPE) Regional Brief – Southern Africa *Women in Wage Employment* (ILO (2003)) 9.

¹³¹² *Ibid* 10.

5.3.4. Informal coping strategies

The reliance on informal coping strategies is not a phenomenon common only in South Africa, but it can be found in almost all SADC countries.¹³¹³ The reasons for the reliance on informal coping strategies are, similar to the case of South Africa, due to (among others) the lack or limited scope of coverage of the formal schemes. Informal coping strategies have emerged as an unofficial subsidiary regime to formal social security schemes. Even so, as indicated earlier (in chapter 3), informal coping strategies cannot be revered as the best form of protection there is. The point is that – despite their importance within the various families, communities and individuals who rely on them – they are vulnerable to external shocks. To this end, it appears necessary that ways and means be investigated and introduced to strengthen informal social security arrangements and most importantly to interlink them with the formal schemes.¹³¹⁴ The *Draft Code on Social Security in the SADC* obliges member states to recognise the existence of informal modes of social security and seek to strengthen and integrate them with formal modes of social security.¹³¹⁵

5.4. Employment protection measures in SADC countries

A variety of employment protection measures, as found in international standards, are identifiable in the SADC region. These measures include, among others, the following: prohibition of unfair dismissal, notice of termination, severance payment, and additional measures for collective dismissal.

5.4.1. Prohibition of unfair dismissal

A majority of SADC countries prohibit employers from terminating the employment contracts of their employees unfairly. Consequently, they require the termination of a contract of employment to be substantively and procedurally fair. Substantive fairness refers to the ground of dismissal. Most countries of the region, which include Botswana, Malawi,

¹³¹³ See paragraph 2.4. in chapter 3.

¹³¹⁴ See paragraph 2.4.3. in chapter 3.

¹³¹⁵ Article 19(3) of the *Draft Code on Social Security in the SADC*.

Namibia, South Africa and Tanzania, require a dismissal to be effected for a valid or/and fair reason. A valid or/and fair reason for dismissal is a reason which is related to the employee's conduct or capacity or based on the employer's operational requirements.¹³¹⁶ It is not a valid reason for an employer to dismiss an employee for, *inter alia*, the following reasons: an employee's membership of a trade union or involvement in lawful trade union activities;¹³¹⁷ discriminatory grounds such as an employee's race, colour, sex, language, religion etc;¹³¹⁸ an employee's exercise of any of the rights conferred by law – particularly labour law; and an employee's pregnancy, intended pregnancy, or any other reason related to her pregnancy.¹³¹⁹ A dismissal based on the foregoing reasons is in South Africa classified an automatically unfair dismissal.¹³²⁰ Procedural fairness, contrary to substantive fairness, is concerned with the fairness of the procedure followed in effecting a dismissal.

5.4.2. Notice of termination

Employers in the region are generally required by law to provide notice of termination to employees to be dismissed and in certain instances (such as redundancies) to a public official (such as the Labour Commissioner).¹³²¹ It should be noted, however, that there are instances where an employer may terminate a contract of employment without notice. Such instances include a situation whereby an employee is guilty of gross misconduct.¹³²² In other instances an employer may pay the employee the remuneration that the employee would have received

¹³¹⁶ See, for example, s 188(1) of the LRA (South Africa), s 57(1) of the *Employment Act* 6 of 2000 (Malawi) and s 37(2) of the *Employment and Labour Relations Act* 6 of 2004 (Tanzania).

¹³¹⁷ See, for example, s 187(1)(a) of the LRA (South Africa), s 23(a) of the *Employment Act* of 1982 (as amended) (Botswana), s 57(3)(e) of the *Employment Act* (Malawi), s 37(3)(a) (iv)-(v) of *Employment and Labour Relations Act* (Tanzania), and s 45(2)(a)(iii) of the *Labour Act* of 1992 (Namibia).

¹³¹⁸ See, for example, s 187(1)(f) of the LRA (South Africa), s 23(d) of the *Employment Act* of 1982 (as amended) (Botswana), s 37(3)(b)(iii) of *Employment and Labour Relations Act* (Tanzania), s 45(2)(b) of the *Labour Act* of 1992 (Namibia). It should be noted that in certain instances a dismissal may be fair on the basis of an inherent requirement of a job. See, for example, s 187(2)(a) of the LRA (South Africa).

¹³¹⁹ See, for example, s 187(1)(e) of the LRA (South Africa) and s 37(3)(b)(i) of the *Employment and Labour Relations Act* (Tanzania).

¹³²⁰ See paragraph 3.1. in chapter 3.

¹³²¹ Such a requirement can be found in countries such as South Africa (see paragraph 3.2. in chapter 3), Lesotho (s 3 of the *Labour Code* of 1992), Botswana (s 25(2) of the *Employment Act* of 1992 (as amended), s 50 of the *Labour Act* of 1992 (Namibia), ss 38 and 41(1)-(2) of the *Employment and Labour Relations Act* (Tanzania) and s 59 (1) of the *Employment Act* (Malawi).

¹³²² See, for example, s 26(4) of the *Employment Act* of 1982 (as amended) (Botswana) and s 41(4) of *Employment and Labour Relations Act* (Tanzania).

if the employee had worked during the notice period instead of giving an employee notice of termination.¹³²³

5.4.3. Severance payment

The payment of severance benefits on termination of a contract of employment is common in the SADC region.¹³²⁴ Severance benefits are often payable subject to conditions. These conditions which vary from one country to another include, *inter alia*, continuous service of a particular duration.¹³²⁵ Notwithstanding the foregoing, the payment of severance pay does not affect any other payments due an employee such as payment in lieu of notice.¹³²⁶ Furthermore, an employer is, in some SADC countries, not obliged to pay severance benefit if a contract of employment is terminated in a fair manner and for a fair reason on account of the employee's misconduct and incapacity.¹³²⁷ Moreover, an employer has no obligation to pay severance benefits to an employee who unreasonably refuses to accept the employer's offer of alternative employment with that employer or any other employer.¹³²⁸ In conclusion, severance payment in the SADC region has an unemployment protection importance. This assertion is informed by the fact that a majority of SADC countries lack unemployment insurance systems. It should be mentioned, however, that South Africa does make provision for severance payment even though it has an unemployment insurance system.¹³²⁹

¹³²³ See, for example, s 64 of the *Labour Code* (Lesotho), s 41(4) of the *Employment and Labour Relations Act* (Tanzania), s 38 of the BCEA (South Africa).

¹³²⁴ They may, for example, be found in countries such as Botswana (s 28 of the *Employment Act* (as amended)), South Africa (see paragraph 3.2. in chapter 3), Lesotho (s 79 of the *Labour Code*), Namibia (s 52 of the *Labour Act*), Malawi (s 35 of the *Employment Act*), and Tanzania (s 42 of the *Employment and Labour Relations Act*).

¹³²⁵ In Tanzania an employee may be entitled to severance pay if he or she has completed twelve (12) months of continuous service with an employer (s 42(2)(a) of the *Employment and Labour Relations Act*). A similar condition can be found in Namibia (s 52(1) of the *Labour Act*). Botswana, unlike Tanzania and Namibia, makes provision for a severance benefit after sixty (60) months of continuous employment (s 28(1) of the *Employment Act*). In South Africa, s 41(2) of the BCEA imposes a duty on an employer to provide an employee with severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer.

¹³²⁶ See, for example, s 38 of the BCEA (South Africa), s 35(5) of the *Employment Act* (Malawi) and s 42(4) of the *Employment and Labour Relations Act* (Tanzania).

¹³²⁷ E.g. Namibia (s 52(2)(a) *Labour Act*), Tanzania (s 42(3)(a) of the *Employment and Labour Relations Act*) and Malawi (s 35(6)(b) of the *Employment Act*).

¹³²⁸ E.g. Namibia (s 52(2)(b) *Labour Act*), Tanzania (s 42(3)(b) of the *Employment and Labour Relations Act*) and Malawi (s 35(6)(c) of the *Employment Act*).

¹³²⁹ See paragraph 3.3. in chapter 3.

5.4.4. Additional measures for collective dismissal

Several SADC countries make provision, in their employment laws, for additional employment measures (e.g. consultation, disclosure of information and fair selection criteria) for termination based on operational requirements. Employment laws of most countries in the region require an employer intending to retrench employees to give notice and/or consult with the applicable trade union(s) and/or employees not represented by such a trade union.¹³³⁰ The consultation process must take place prior to the retrenchment and should address pertinent issues such as the reasons for the intended retrenchment, the measures to avoid or minimise the intended retrenchment, the method of selection of the employees to be retrenched, the timing of the retrenchments and the severance pay in respect of the retrenchments.¹³³¹ Employers are required to disclose all relevant information on the intended retrenchment for the purpose of meaningful consultation.¹³³² There are, in certain instances, exceptions to this requirement. In South Africa, for example, an employer is not required to disclose information that is legally privileged, that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court, that is confidential and, if disclosed, may cause substantial harm to an employee or the employer, or that is private personal information relating to an employee, unless that employee consents to the disclosure of that information.¹³³³

5.4.5. Some observations

Although employment protection measures can be found in almost every SADC member state, it should be mentioned that these measures are generally restricted to formal sector workers. And in some cases they do not cover the atypically employed. The impact of this is that some workers in SADC countries who are engaged in the informal economy are excluded from something as fundamental as employment protection. As a result, efforts

¹³³⁰ E.g. South Africa (see paragraph 3.1.2. in chapter 3), Tanzania (s 38(1)(a), (c) and (d) of the *Employment and Labour Relations Act*) and Namibia (s 50(1) of the *Labour Act*).

¹³³¹ See, for example, s 50(1) of the *Labour Act* (Namibia), s 189(2) of the LRA (South Africa) and s 38(1)(c) of the *Employment and Labour Relations Act* (Tanzania).

¹³³² See, for example, s 38(1)(b) of the *Employment and Labour Relations Act* (Tanzania).

¹³³³ S 16(5) of the LRA.

should be channelled at national and SADC level towards the extension of employment protection to cover the currently excluded groups of workers.

6. INTERNATIONAL, SUPRANATIONAL AND REGIONAL STANDARDS: SOME OBSERVATIONS

6.1. South African perspective

In redesigning the South African unemployment protection system, there are several crucial issues emanating from the international (ILO), supranational (the EU) and regional (Council of Europe) standards which should be taken into account: the nature of the contingency covered by the South African unemployment insurance scheme should be broadened, the scope of coverage of the unemployment insurance scheme requires some widening, some provisions concerning the unemployment insurance benefits are in conflict with ILO unemployment instruments, the ratification of the up-to-date instruments by South Africa is unsatisfactory and (re)integration measures are a crucial part of an unemployment protection system.

6.1.1. Broadening of the nature of the contingency covered by the unemployment insurance scheme

The ILO international labour standards¹³³⁴ and regional standards,¹³³⁵ for the most part, cover both full and partial unemployment. In contrast, the covered under the South African unemployment insurance system is limited to, in the case of contributors other than domestic workers, full unemployment. By adding partial unemployment as a contingency covered for all insured persons, South Africa will be benefiting, *inter alia*, employers and their employees in the sense that employers will be enabled to retain a skilled and experienced work force while workers avoid (full) unemployment. In addition, this will have the effect of aligning the unemployment insurance system, in as far as the nature of the contingency

¹³³⁴ See paragraph 2.2.2.1. in chapter 4.

¹³³⁵ See paragraph 4.2.1.2. in chapter 4.

covered is concerned, with the up-to-date conventions in the unemployment protection field – particularly the *Employment Promotion and Protection against Unemployment Convention*.

6.1.2. Widening of the scope of coverage of the unemployment insurance scheme

The exclusion of migrant non-citizens who work on a fixed-term contract basis from the ambit of the South African unemployment insurance system is in breach of the *Unemployment Convention* (1919). To comply with this instrument, South Africa should extend the scope of coverage of its unemployment insurance scheme to non-citizen fixed-term contract workers. Furthermore, it should ideally enter into bilateral agreements with other countries, so as to further give effect to the *Unemployment Convention*, so as to extend the equality of treatment to non-citizens in respect of the unemployment insurance scheme. A second issue relating to the scope of coverage is that the up-to-date instruments such as the *Employment Promotion and Protection against Unemployment Convention* do require member states to include public servants, whose employment up to normal retirement age is not guaranteed by national laws or regulations, in their unemployment insurance schemes. This it is to be welcomed because the assumption that employment security is high among public servants is not entirely correct. In South Africa, for instance, the risk of being unemployed is as high as it is in the private sector. To this end, South Africa should widen the scope of coverage of its unemployment insurance scheme to include civil servants.

6.1.3. Provisions concerning the unemployment insurance benefits in conflict with international unemployment instruments

There are some provisions concerning the unemployment insurance benefits which contradict those contained in the ILO unemployment instruments. For example, the unemployment insurance scheme provides benefits in the case of inability to work due to illness. This infringes the general aim of the condition that a claimant must be capable and available for work. This aim is to render such persons ineligible for unemployment insurance benefits. Such persons should be covered under a social security scheme dealing with the risk concerned (i.e. sickness). For this reason South Africa should separate ideally unemployment

benefits from sickness and family-related benefits (e.g. maternity benefits) as far as the unemployment insurance scheme is concerned.

Secondly, the ILO international instruments (such as the *Income Security Recommendation*) require that tax financed benefits be provided alongside the contribution-financed benefits. A similar approach can be found in the social security instruments of the Council of Europe.¹³³⁶ The overall goal, so it seems, is to ensure that individuals who have exhausted their benefits or those who have not yet acquired the right to benefit are not left destitute. Nevertheless, the South African unemployment system does not provide for a complementary tax-financed scheme as envisaged by, for example, the *Income Security Recommendation*. It is doubtful if the social assistance grants available at the moment would fulfil the role of the complementary tax-financed scheme envisaged by the ILO instruments dealing with unemployment. This is largely due to its limited scope of coverage. Therefore, it is suggested that South Africa should investigate the possibilities of introducing or expanding one or a combination of tax-financed alternatives.

6.1.4. Ratification of the up-to-date instruments by South Africa

South Africa has an unsatisfactory ratification record of ILO unemployment (-related) instruments – particularly the up-to-date ones. In an attempt to redesign its unemployment protection system, South Africa needs to align its system with the ILO (up-to-date) international unemployment standards (such as *Employment Promotion and Protection against Unemployment Convention*, the *Social Security (Minimum Standards) Convention* and the *Income Security Recommendation*). The process of aligning the unemployment protection system with international standards should be followed by the ratification the up-to-date ILO instruments in the unemployment protection field.

¹³³⁶ See paragraph 4.2.1.3. in chapter 4.

6.1.5. (Re)integration measures as a crucial part of an unemployment protection system

Measures to create and promote employment, to (re)integrate the unemployed persons into the labour market and to coordinate unemployment protection and employment policies are an integral part of an unemployment protection system. This is evident from the international (ILO), supranational (the EU) and regional (Council of Europe) standards.¹³³⁷ Nonetheless, these measures remain weak or absent in South Africa. For example, the South African employers are not required to notify a competent public authority about the impending collective dismissals. It is submitted that the notification of a public authority if linked with employment protection measures could be one of those ways in through linkages could be forged between employment policy and unemployment protection measures. This assertion is informed by the fact that the notification of a public authority is aimed at providing the authorities with an opportunity to prepare the labour market for the absorption of extra unemployed persons or to activate appropriate unemployment protection measures. South Africa should, as matter of urgency, redesign its unemployment protection system so as to ensure that it (adequately) links income security and employment protection and promotion.

6.2. Southern African Development Community perspective

SADC in its quest to develop and improve social protection in the region could benefit from the fact that: good implementation and monitoring mechanisms are crucial, social security coordination is an integral part of regional integration and free movement of persons, prevention and (re)integration measures need to be established and/or reinforced and the undeveloped and underdeveloped state of social protection need to be addressed.

6.2.1. Importance of good implementation and monitoring mechanisms

Effective implementation and monitoring mechanisms, at both national and regional level are important for the success of the regional social security standards. SADC should clarify and

¹³³⁷ See paragraphs 2.3., 3.4., 3.1.2.3. and 3.1.2.2. in chapter 4.

develop the monitoring and implementing process as contained in several of its instruments inclusive of those which are yet to come into force (e.g. the *Draft Code on Social Security in the SADC*). In this endeavour, valuable lessons could be drawn from the experience of regional organisations such as the Council of Europe.¹³³⁸

6.2.2. Social security coordination as an integral part of regional integration and free movement of persons and workers

Social security coordination is an integral part of regional integration and free movement of persons and workers. Consequently, any attempt to implement policies geared at regional integration and the free movement of labour and persons in the region without sound social security coordination could be self-defeating. Social security coordination principles developed and followed by international institutions such as the ILO, the EU and the Council of Europe are provided for by the *Draft Code on Social Security in the SADC*. Nonetheless, this instrument is not yet in force.

6.2.3. Introduction and reinforcement of prevention and (re)integration measures

There is a dearth of prevention and integration measures in the region. Thus, provisions contained in the SADC Social Charter and the *Draft Code on Social Security in the SADC* aimed at the promotion of the aforesaid measures are to be welcomed. By providing for the preventive and (re)integrative measures, these instruments break away from the practice whereby social security schemes (particularly unemployment protection schemes) concern themselves only with the payment of benefits. Additionally, this is in tune with international standards – particularly those of the ILO.

7. SUMMARY

In this chapter, standards pertaining to (un)employment protection were examined from three dimensions, i.e. international (International Labour Organisation), supranational (European

¹³³⁸ See paragraph 4.1.3. in chapter 4.

Union) and regional (Council of Europe and Southern African Development Community). Certain core issues flowing from this part of study will be summarised under the following headings: unemployment protection standards, enforcement of (un)employment protection standards, social security coordination, prevention and (re)integration measures and employment protection.

7.1. Nature of unemployment protection standards

Standards concerning unemployment protection can be found in the legal instruments of the International Labour Organisation (ILO), the European Union (EU), Council of Europe and the Southern African Development Community (SADC). Nevertheless, the nature of these standards is not always the same. The unemployment protection standards contained in the ILO instruments are universal. For that reason, they provide – (to a certain extent), identical minimum standards which apply to almost all countries of the world. Unlike those of the ILO, unemployment protection standards of the EU, the Council of Europe and SADC apply to their respective regions. Secondly, the level of the unemployment standards of the ILO, the EU, the Council of Europe and the SADC is not always the same. The EU and the Council of Europe unemployment standards are generally higher than those of the ILO.¹³³⁹ The unemployment protection standards of the Council of Europe are, for example, set at a higher level than those of the ILO. The rationale behind this is that Council of Europe's member states are socially and economically more advanced than many of the other ILO member states.¹³⁴⁰ This, it is argued, underscores the point that – although regions of the world may draw some inspiration from the ILO instruments (such as the *Social Security (Minimum Standards) Convention*) when setting their unemployment protection standards – regional standards can be set according to the regions' social and economic situations. The SADC, in its quest to set unemployment protection standards, should take into account the social and economical strength of the region. This implies that it should, through the passage of time, revise its unemployment protection standards to reflect any social and economic

¹³³⁹ For instance, the benefit levels provided by the *European Code of Social Security* are higher than those of the *Social Security (Minimum Standards) Convention*.

¹³⁴⁰ Pennings F and Schulte B "International social security standards: An overview" in Pennings F (ed) *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer (2006)) 1 at 24.

development that may have occurred. In addition, the instruments of the Council of Europe and the SADC (which are intergovernmental organisations), unlike those of the EU (which is a supranational organisation), are not directly binding at a national level save to the extent ratified by the normal parliamentary procedures of member states concerned and incorporated into national legislation.

7.2. Enforcement of (un)employment protection standards

All four organisations investigated in this chapter, endeavoured to establish a supervisory system to enforce or monitor implementation of and compliance with the (un)employment protection standards. Nevertheless, these supervisory systems have their own shortcomings. For example, the EU enforcement procedure is criticised for the reason that the Commission lacks the capability of detecting and legally pursuing all instances of non-compliance. Another point of criticism against the EU enforcement procedure is that its strategies to secure compliance have the potential of undermining each other's effects. For instance, it is argued that some member states' non-compliance may stem from the lack of resources and not the lack of will and in this situation the imposition of penalties could reinforce the problem. As regards the supervisory system of the Council of Europe as contained in the *European Social Charter*, it stands accused – with the exception of the Committee of Experts – of not being adequately independent of the contracting parties. The second point of criticism is that the conclusions of the Committee of Experts and the recommendations of the Committee of Ministers are not binding. On the other hand, the implementation and monitoring mechanisms of SADC are still in their infancy. For that reason, it is submitted that SADC can draw some valuable lessons – particularly as regards the national reports approach and the operation of the Committee of Experts – from the ILO's and Council of Europe's experience in developing in own supervisory and enforcement system.

7.3. Social security coordination

Social security coordination as provided for in the instruments of the ILO, the EU, the Council of Europe and SADC (although the *Draft Code on Social Security in the SADC* is

not yet in force) are based on the following principles: the equality of treatment, the unicity of the applicable legislation, the maintenance of acquired rights, exportability of benefits and the aggregation of periods of insurance. The primary aim of social security coordination is to ensure that migrants (and their families) are not disadvantaged as regards the social security entitlements as they migrate. As is apparent from the EU experience, social security coordination is also crucial for the facilitation of the free movement of persons and regional integration. Regional integration and free movement of persons as well as workers are some of the aims of SADC. In light of that it is recommended that SADC develop its regional integration and freedom of movement policies in tandem with social security coordination policies.

7.4. Unemployment prevention and (re)integration measures

The ILO, the EU and the Council of Europe, as shown in this chapter, do embrace the same measures intended at preventing unemployment as well as ensuring that the unemployed are (re)integrated into the labour market. These measures, which are (or should be) an important part of a social security system, are limited or lacking in the SADC region. In view of that, the call by the *SADC Social Charter* and the *Draft Code on Social Security in the SADC* for the introduction of these measures is to be welcomed. This, the chapter argues, is in accordance with the ILO's standards.

7.5. Employment protection

Employment protection measures, as found in the international standards, such as the *protection against unfair dismissal*, *notice of termination*, and *severance pay* and so forth are identifiable in laws of SADC member states. Nevertheless, these measures are generally *confined to formal sector employment*. And, in some cases, they *do not cover the atypically employed*. This is also discernable in the ILO employment protection instruments. This is disadvantageous to the vast majority of workers in SADC countries who are engaged in the informal economy. As a result, the chapter recommends that SADC member states, at

national and SADC level, should endeavour to expand employment protection to cover the currently excluded groups of workers.

CHAPTER 5

SPECIFIC COUNTRY PERSPECTIVES

1. INTRODUCTION: SOME GENERAL REMARKS

As is evident from the title of this study, the primary aim of this investigation is to redesign the South African unemployment protection system. In pursuit of this aim international, supranational and regional standards in the unemployment protection sphere were examined in the preceding chapter. In this chapter, the unemployment protection systems of Germany and India will be investigated. The main goal is to distil alternative and innovative approaches from these jurisdictions which could provide some valuable lessons in South Africa's quest to redesign its unemployment protection system.

2. (UN)EMPLOYMENT PROTECTION IN GERMANY

2.1. Constitutional overview

Germany¹³⁴¹ is, like South Africa, a constitutional state. Chapter I of the German Constitution (*Grundgesetz*) of 23 May 1949 (hereinafter the German Constitution)¹³⁴² provides for a variety of judicially enforceable basic rights¹³⁴³ which underpin the German

¹³⁴¹ Germany comprises of 16 federal states (*Bundesländer*), i.e. Baden Württemberg, Bayern (Bavaria), Berlin, Brandenburg, Bremen, Hamburg, Hessen, Mecklenburg-Vorpommern, Niedersachsen, Nordrhein-Westfalen, Rheinland-Pfalz, Saarland, Sachsen, Sachsen-Anhalt, Schleswig-Holstein and Thüringen. Germany stretches over an area of 357,021 square kilometres (that is 349,223 square kilometres of land and 7,798 square kilometres of water) (Central Intelligence Agency *The World Fact Book: Germany* – accessed at <http://www.cia.gov/cia/publications/factbook/geos/gm.html#Econ>). It is flanked by Austria (784 km), Belgium (167 km), Czech Republic (646 km), Denmark (68 km), France (451 km), Luxembourg (138 km), Netherlands (577 km), Poland (456 km), and Switzerland (334 km) (*ibid*). Germany has some 82.6 million people living on its territory. In addition, Germany is Europe's largest economy (Lohse T Hartz IV – *The German "Word of the Year 2004"* and the Country's Hope to Overcome its Problem of Unemployment (Diskussionspapiere der Wirtschaftswissenschaftlichen Fakultät der Universität Hannover No. 311 (2005)) 1). The German economy is the fifth largest national economy in the world (Central Intelligence Agency *The World Fact Book: Germany* – accessed at <http://www.cia.gov/cia/publications/factbook/geos/gm.html#Econ>).

¹³⁴² Excerpts of the German Constitution found in this study are from a translated version of the German Constitution – Tschentscher A *The Basic Law (Grundgesetz): The Constitution of the Federal Republic of Germany (May 23rd, 1949)* (Jurisprudencia (2003)).

¹³⁴³ See article 19(4) of the German Constitution.

(un)employment protection system. These rights, which are founded on human dignity,¹³⁴⁴ include, among others, the following: human dignity,¹³⁴⁵ liberty,¹³⁴⁶ equality,¹³⁴⁷ freedom of association¹³⁴⁸ and work.¹³⁴⁹ It should be mentioned that the rights contained in Chapter I are

¹³⁴⁴ This view is inferred from the wording of article 1 of the German Constitution which reflects “the belief that human rights are founded upon human dignity, and not the other way around.” Venter F *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States* (Juta/Kluwer (2000)) 135.

¹³⁴⁵ Human dignity is, as declared by the German Constitution, inviolable (article 1(1) of the German Constitution). The German Constitution imposes a duty on all state authority to respect and protect human dignity (*ibid*). In what may be interpreted as a clear indication of the “impact of human dignity as foundational value upon fundamental rights” (Venter F *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States* (Juta/Kluwer (2000)) 135), the German Constitution provides that: “The German People...acknowledge inviolable and inalienable human rights as the basis of every human community, of peace, and of justice in the world” (article 1(2) of the German Constitution). It provides further that the basic rights are binding on the legislature, executive and judiciary as directly valid law (article 1(3) of the German Constitution).

¹³⁴⁶ Every person in German has the right to free development of his personality (article 2(1) of the German Constitution). This right is subject to the condition that the person concerned does not violate the rights of others or infringe upon the constitutional order or morality (*ibid*). Apart from the preceding right, everyone has the right to life and to physical integrity (article 2(2) of the German Constitution). This right is however subject to the limitation clause (*ibid*).

¹³⁴⁷ All human beings are, in accordance with the German Constitution, equal before the law (article 3(1) of the German Constitution). Nonetheless, this does not mean that all persons are to be treated the same at all times. What it entails is that: “...it is the duty of public authorities to differentiate only for convincing reasons. The prohibition of [article 3(1) of the German Constitution] can be formulated as follows: like is to be treated alike, and unlike is to be treated unlike according to differences and characteristics. The equality principle is breached when there is no good reason arising from the nature of things or other evident grounds for the differentiation or unequal treatment, in short when a decision must be described as arbitrary” (Hailbronner K and Kau M “Constitutional Law” in Zekoll J and Reimann M (eds) *Introduction to German Law* (2nd edition) (Kluwer (2005)) 53 at 76-77). The German Constitution, in addition, entrenches the right to equality between men and women (article 3(2) of the German Constitution). It provides further that no person may be disadvantaged or favoured on the basis of that person’s sex, parentage, race, language, homeland and origin, or religious or political opinions (article 3(3) of the German Constitution). A person may not, in addition to the foregoing, be disadvantaged due to such person’s handicap (*ibid*). See, for further reading on the issue of equality in Germany, Weiss M “The interface between constitution and labor law in Germany” (2005) 26 *Comparative Labor Law and Policy Journal* 181 at 191-192, Bertelsmann K and Rust U *Equality in Law between Men and Women in the European Community: Germany* (Martinus Nijhoff (1995)) and Würtenberger T “Equality” in Karpen U (ed) *The Constitution of the Federal Republic of Germany: Essays on the Basic Rights and Principles of the Basic Law with a Translation of the Basic Law* (Nomos (1988)) 67.

¹³⁴⁸ The German Constitution provides all Germans (see art 116 of the German Constitution for the definition of a ‘German’) with the right to associate by forming clubs and societies (article 9(1) of the German Constitution). It, nonetheless, proscribes associations whose purposes or activities are in conflict with criminal laws or are directed against the constitutional order or the concept of international understanding (article 9(2) of the German Constitution). In addition to the right to form clubs and societies, the German Constitution guarantees the right to form associations to safeguard and improve working and economic conditions to everyone and for all professions (article 9(3) of the German Constitution). It protects the aforesaid right by declaring that agreements which restrict or seek to impair this right are null and void, whereas measures directed to this end are illegal (*ibid*). The right to freedom of association may be forfeited. Such forfeiture may occur when the right is abused in order to combat the free democratic basic order. The forfeiture of the right to freedom of association and the extent thereof is, however, determined by the Federal Constitutional Court (article 18 of the German Constitution). See Weiss M “The interface between constitution and labor law in Germany” (2005) 26 *Comparative Labor Law and Policy Journal* 181 at 184-185 and Weiss M “Labor law” in Zekoll J and Reimann M (eds) *Introduction to German Law* (2nd edition) (Kluwer (2005)) 299 at 304-305.

not absolute.¹³⁵⁰ Furthermore, the executive and judiciary powers in Germany are bound by law and justice.¹³⁵¹ Additionally, Germany is conceived as a democratic and social federal state.¹³⁵² The moral horizon of Germany is “composed of diverse values, such as economic security, liberty, equality, and justice.”¹³⁵³ The significance of these values lies in the fact that they give shape to the German social security system.¹³⁵⁴ The German Constitution obliges the states (*Länder*) to conform to the principles of, *inter alia*, democratic and social state under the rule of law.¹³⁵⁵ It should also be recalled that Germany, as provided by article 23(1) of its Constitution, participates in the development of the European Union which is bound to democratic, rule of law, social and federal principles as well as the principle of

¹³⁴⁹ Every German has a right to freely choose his or her occupation, place of work and place of study or training (article 12(1) of the German Constitution). The German Constitution, as a general rule, proscribes forced labour (article 12(2) of the German Constitution). There are, however, some exceptions. Firstly, a person may be forced to work within the framework of a traditional compulsory community service that applies generally and equally to all (*ibid*, also see article 12(a) of the German Constitution)). Secondly, forced labour may be imposed on persons deprived of their liberty by court sentence (article 12(3) of the German Constitution). See Weiss M “The interface between constitution and labor law in Germany” (2005) 26 *Comparative Labor Law and Policy Journal* 181 at 189-190.

¹³⁵⁰ Article 19 of the German Constitution provides that: “(1) Insofar as a basic right may, under this Constitution, be restricted by or pursuant to a statute, such statute must apply generally and not solely to an individual case. Furthermore, such statute must name the basic right, indicating the relevant article. (2) In no case may the essence of a basic right be infringed. (3) Basic rights also apply to domestic corporations to the extent that the nature of such rights permits. (4) Should any person’s rights be violated by public authority, recourse to court is open to him. Insofar as no other jurisdiction has been established, recourse is available to the courts of ordinary jurisdiction.”

¹³⁵¹ Article 20(1) of the German Constitution. See Klein E “The concept of the Basic Law” in Starck C (ed) *Main Principles of the German Basic Law* (Nomos (1983)) 15 at 19-20.

¹³⁵² Article 20(1) of the German Constitution.

¹³⁵³ Schmid J “Germany” in Joos PA *et al* (eds) *Social Security and Solidarity in the European Union: Facts, Evaluations and Perspectives* (Physica (2000)) 65 at 67.

¹³⁵⁴ *Ibid*. See Hilf M “General problems of relations between constitutional law and international law” in Starck C (ed) *Rights, Institutions and Impact of International Law according to the German Basic Law* (Nomos (1987)) 177, Riedel EH “Assertion and protection of human rights in international treaties and their impact in the Basic Law” in Starck C (ed) *Rights, Institutions and Impact of International Law according to the German Basic Law* (Nomos (1987)) 197, Weber A “The supranationality problem” in Starck C (ed) *Rights, Institutions and Impact of International Law according to the German Basic Law* (Nomos (1987)) 223 and Klein E “The concept of the Basic Law” in Starck C (ed) *Main Principles of the German Basic Law* (Nomos (1983)) 15 at 21-22.

¹³⁵⁵ Article 28(1) of the German Constitution. See Hailbronner K and Kau M “Constitutional Law” in Zekoll J and Reimann M (eds) *Introduction to German Law* (2nd edition) (Kluwer (2005)) 53 at 56-59, Siedentopf H “The principle of the rule of law” in Siedentopf H *et al* (eds) *The Rule of Law in Public Administration: The German Approach* (Hochschule für Verwaltungswissenschaften Speyer (1993)) 3, Götz V “Legislative and executive power under the constitutional requirements entailed in the principle of the rule of law” in Starck C (ed) *New Challenges to the German Basic Law* (Nomos (1991)) 141, Karpen U “Rule of law” in Karpen U (ed) *The Constitution of the Federal Republic of Germany: Essays on the Basic Rights and Principles of the Basic Law with a Translation of the Basic Law* (Nomos (1988)) 169 and Kunig P *Das Rechtsstaatsprinzip* (J.C.B. Mohr (1986)).

subsidiarity.¹³⁵⁶ Apart from the foregoing there are other principles (such as the so-called triad of liberty, equality and solidarity)¹³⁵⁷ which are important for the reason that “they provide orientation and legitimisation to the actors in the field of social security.”¹³⁵⁸

Another important point to be noted is that the German Constitution considers the general rules of public international law as an integral part of the federal law.¹³⁵⁹ To this end, they take precedence over statutes and directly create rights and duties for the inhabitants of the federal territory.¹³⁶⁰ Germany has, as on 26 May 2006, ratified 83 ILO instruments.¹³⁶¹ These instruments include, among others, the following (un)employment protection (-related) instruments: the *Unemployment Convention* (1919), the *Maternity Protection Convention* (1919), the *Freedom of Association and Protection of the Right to Organise Convention*, the *Employment Service Convention*, the *Right to Organise and Collective Bargaining Convention*, the *Equal Remuneration Convention*, the *Social Security (Minimum Standards) Convention*, and the *Discrimination (Employment and Occupation) Convention*, the *Equality of Treatment (Social Security) Convention*, and the *Employment Policy Convention*.¹³⁶² In addition, Germany has entered into a number of bilateral agreements in the social security sphere.¹³⁶³ These agreements include those dealing with unemployment insurance such as the

¹³⁵⁶ See, about the subsidiarity principle, Schmid J “Germany” in Joos PA *et al* (eds) *Social Security and Solidarity in the European Union: Facts, Evaluations and Perspectives* (Physica (2000)) 65 at 67, Voges W *et al* “Uneven development – local authorities and workfare in Germany” in Lødemel I and Trickey H (eds) *An Offer You Can’t Refuse’: Workfare in International Perspective* (The Policy Press (2000)) 71 at 72-73 and Spieker M “State benefits and the principle of subsidiarity. The crisis of the welfare state in the Federal Republic of Germany: Causes and remedies” (1985) 10 *Labour and Society* 83.

¹³⁵⁷ According to Schmid (Schmid J “Germany” in Joos PA *et al* (eds) *Social Security and Solidarity in the European Union: Facts, Evaluations and Perspectives* (Physica (2000)) 65 at 67) the so-called triad of liberty, equality and solidarity plays the following roles: “It establishes and regulates a complex mesh of reciprocal duties and considerations. It also helps distinguishing between collective and individual responsibilities. Finally, it constitutes the ethical foundation for redistributive measures and examples of barter justice.”

¹³⁵⁸ Schmid J “Germany” in Joos PA *et al* (eds) *Social Security and Solidarity in the European Union: Facts, Evaluations and Perspectives* (Physica (2000)) 65 at 67.

¹³⁵⁹ Article 25 of the German Constitution.

¹³⁶⁰ *Ibid.*

¹³⁶¹ ILO “ILOLEX” – <http://www.ilo.org>.

¹³⁶² See, on the impact of social security Conventions on German social security laws, Schulte B “The impact of social security conventions: Germany” in Pennings F (ed) *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer (2006)) 115 and Schnorr G “The influence of ILO standards on law and practice in the Federal Republic of Germany” (1974) 110 *International Labour Review* 539 at 560-562.

¹³⁶³ Schmidt M and Mader J “Internationale Abkommen in der Sozialversicherung” (2004) 2 *Bundesarbeitsblatt* 11. Also see Nußberger A “Die Wirkungsweise internationaler und supranationaler Normen im Bereich des

Agreement on Unemployment Insurance between the Federal Republic of Germany and Greece (of 31 May 1961),¹³⁶⁴ *Agreement on Unemployment Insurance between the Federal Republic of Germany and Yugoslavia* (of 12 October 1968)¹³⁶⁵ and *Agreement on Unemployment Insurance between the Federal Republic of Germany and Switzerland* (of 20 October 1982).¹³⁶⁶ These agreements require, for example, the equality of treatment of nationals of the contracting parties as regards unemployment insurance. In light of Germany's ratification of the *Unemployment Convention* (1919), it could be said that the bilateral agreements (dealing with unemployment insurance) are in accordance with that Convention. As remarked earlier, this Convention requires member states which have ratified it and which have established unemployment insurance systems to "make arrangements whereby workers belonging to one member and working in the territory of another shall be admitted to the same rates of benefit of such insurance as those which obtain for the workers belonging to the latter."¹³⁶⁷ South Africa, which has ratified this Convention and has established an unemployment insurance system but is yet to enter into bilateral agreements dealing with unemployment insurance, could benefit from the German experience and establish such agreements so as to comply with its international obligations.

2.2. Unemployment protection

2.2.1. Introduction

Unemployment protection in Germany is, generally speaking, organised in accordance with three principles. These are the social insurance principle (*Versicherungsprinzip*), the maintenance principle (*Versorgungsprinzip*) and the public welfare principle (*Fürsorgeprinzip*).¹³⁶⁸ Following the Hartz reforms,¹³⁶⁹ the unemployment assistance

Arbeits- und Sozialrechts" in Ekonomi M *et al* (eds) *Der Einfluss internationalen Rechts auf das türkische und das deutsche Arbeits- und Sozialrecht* (Nomos (2003)) 43.

¹³⁶⁴ Law of 3 September 1962 – *Bundesgesetzblatt* (Federal Law Gazette (hereinafter BGBl.) 1962 II Seite (page (hereinafter S.)) 1109.

¹³⁶⁵ Law of 14 August 1969 – BGBl. 1969 II S. 147.

¹³⁶⁶ Law of 13 September 1983 – BGBl. 1983 II S. 578.

¹³⁶⁷ Article 3 of the *Unemployment Convention* (1919).

¹³⁶⁸ See, for example, Voges W *et al* "Uneven development – local authorities and workfare in Germany" in Lødemel I and Trickey H (eds) *'An Offer You Can't Refuse': Workfare in International Perspective* (The Policy Press (2000)) 71 at 72-78.

(*Arbeitslosenhilfe*)¹³⁷⁰ and social assistance (*Sozialhilfe*) benefits were merged and a new social assistance benefit (unemployment benefit II) was introduced. It could be argued, however, that the merger of the unemployment assistance and the social assistance benefit did not alter the organisation of the unemployment protection in three principles. This assertion stems from the fact that the new unemployment assistance draws a line of distinction between unemployed persons who are capable of work¹³⁷¹ and those who are not.¹³⁷² Those individuals who are incapacitated to work are provided with assistance for living costs.¹³⁷³

2.2.2. Social insurance

There are several social insurance principle-based schemes which (in)directly provide unemployment protection. These schemes include, among others, those that make provision for unemployment insurance, sickness benefits, maternity benefits and survivors' benefits. The basic theory underlying the social insurance principle is that employees contribute toward a compulsory insurance scheme to insure themselves against a particular social risk. While this may be the case, employees with insignificant employment (up to €400 per

¹³⁶⁹ 'Hartz reforms' refer to the labour market reforms introduced pursuant to the recommendations of the Commission for Modern Services on the Labour Market (*Kommission für moderne Dienstleistungen am Arbeitsmarkt*). The notion of 'Hartz reform' is derived from the name of the commission's head Peter Hartz (the then Head of human resources at Volkswagen). The Hartz reforms are an integral part of a series of the German government's package of reforms ('Agenda 2010') aimed at a comprehensive overhaul of the German labour market, commonly known as Hartz I-IV. Hartz I-III came into operation between January 1, 2003 and 2004 while Hartz IV came into effect on 1 January 2005. It is interesting to note that Hartz IV was chosen as the German "word of the year 2004" (Lohse T *Hartz IV – The German "Word of the Year 2004" and the Country's Hope to Overcome its Problem of Unemployment* (Diskussionspapiere der Wirtschaftswissenschaftlichen Fakultät der Universität Hannover No. 311 (2005)) 2).

¹³⁷⁰ Unemployment assistance is in conformity with the maintenance principle. The maintenance principle relates to non-contributory forms of support. These forms of support, such as unemployment assistance, are generally financed through general taxation.

¹³⁷¹ According to Ochel W "Hartz – Welfare to work in Germany" (2005) 2 *CESifo Dice Report* 18 at 20): "Individuals are considered able to work if they are capable of working for three hours a day under the usual conditions of the labour market and will not be hindered to do so in the foreseeable future because of illness or handicap. The individual working ability is evaluated purely from a medical standpoint. It is decided by the institution responsible for the safety net, i.e., usually the local employment office."

¹³⁷² See paragraph 2.2.3. on unemployment assistance below.

¹³⁷³ *Ibid.*

month) or who earn above a set income ceiling are normally exempted from the scheme.¹³⁷⁴ Voluntary insurance is, in certain instances, possible.¹³⁷⁵

2.2.2.1. Unemployment insurance benefits

The statutory basis of unemployment insurance (*Arbeitslosenversicherung*) in Germany is laid out in the *Social Code (Sozialgesetzbuch)* Book III (from 24 March 1997). The unemployment insurance scheme is financed through contributions from employers and their employees. Employers and employees contribute a total of 6.50% (that is 3.25% from employees and 3.25% from employers) of an employee's salary. The government contributes towards any deficits. The scope of coverage of the German unemployment insurance scheme covers employees employed for a minimum of 15 hours per week and earning more than €400 per month.¹³⁷⁶ In addition, there are categories of employees, which include civil servants (*Beamte*), which are excluded from the ambit of the unemployment insurance scheme. Nevertheless, civil servants in Germany enjoy a higher level of employment protection. Self-employed persons or persons caring for a relative at home have, in accordance with the changes introduced by Hartz IV, an opportunity to voluntarily contribute towards the unemployment insurance scheme in order to maintain or to reach their entitlements.¹³⁷⁷ This possibility, should it be adopted in South Africa, could be instrumental in ensuring that persons in South Africa who migrate from contributory employment to self-employment or unpaid care work do not lose their entitlement to benefits.

The German unemployment insurance system, as opposed to that of South Africa, covers both total and partial unemployment benefits.¹³⁷⁸ This is in accordance with international instruments in the unemployment protection sphere – particularly the ILO *Employment*

¹³⁷⁴ See Werner H and Winkler W *Unemployment Compensation Systems: A Cross-Country Comparison* (Institute for Employment Research of the Federal Employment Services Topic No. 56 (2004)) 19.

¹³⁷⁵ See, for instance, article 28(a) of Book III of the *Social Code*.

¹³⁷⁶ Werner H and Winkler W *Unemployment Compensation Systems: A Cross-Country Comparison* (Institute for Employment Research of the Federal Employment Services Topic No. 56 (2004)) 19.

¹³⁷⁷ Article 28(a) of Book III of the *Social Code*.

¹³⁷⁸ It should be noted that the unemployment benefit has, pursuant to Hartz IV, been renamed the unemployment benefit I (*Arbeitslosengeld I*).

Promotion and Protection against Unemployment Convention (1988).¹³⁷⁹ South Africa could follow the German example as well as international standards and provide unemployment insurance benefits to the partially unemployed – in the same way as the old UIA did. The current unemployment insurance system limit partial unemployment benefits to domestic workers. Although the German system does provide both total and partial benefits, it should be emphasised that an unemployed person must – before he or she can draw the total unemployment benefit – comply with the following qualifying conditions. He or she must have been compulsorily insured for at least 12 months during the last two years,¹³⁸⁰ be without work and looking for work¹³⁸¹ and have personally registered at an unemployment agency as unemployed.¹³⁸² In the case of partial unemployment benefit,¹³⁸³ an unemployed person must comply with the following requirements: partial unemployment, personal declaration at the employment agency and compulsory insurance coverage for at least 12 months during the last two years, in addition to the work he or she is carrying on.¹³⁸⁴ There is no waiting period required before one can draw benefits and the rate of benefits for employees with children is 67% of net earnings whereas that for employees without children is 60% of net earnings.¹³⁸⁵ The periods of entitlement to the unemployment benefit have been reduced as from 1 February 2006. For example, the maximum duration of the period for which one may be entitled to unemployment benefit has been reduced from 32 to 18 months.

2.2.2.2. Sickness

An employee who is (temporarily) incapable to work on account of sickness is entitled to sickness cash benefits. As an exception to the principle ‘no work no pay’, employers are required to continue paying a sick employee’s regular salary for up to a six week period.¹³⁸⁶

¹³⁷⁹ Germany is (as on 26 May 2006) yet to ratify this up-to-date instrument.

¹³⁸⁰ Articles 123 and 124 of Book III of the *Social Code*.

¹³⁸¹ Article 119 of Book III of the *Social Code*.

¹³⁸² Article 122 of Book III of the *Social Code*.

¹³⁸³ It should be kept in mind that there are, in addition to the partial unemployment benefit, benefits such as the bad winter weather allowance (*Winterausfallgeld*) (article 214 of Book III of the *Social Code*).

¹³⁸⁴ Article 150 of Book III of the *Social Code*.

¹³⁸⁵ Article 129 of Book III of the *Social Code*.

¹³⁸⁶ S 3 of the *Payment of Wages during Sickness Act* of 26 May 1994 (Gesetz über die Zahlung des Arbeitsentgelts an Feiertagen und im Krankheitsfall (Entgeltfortzahlungsgesetz) Gesetz vom 26.5.1994 (BGBl. I S. 1014)).

However, employees who have been employed for less than four weeks as well as those employees who become sick due to their own fault are not entitled to the aforesaid payment. Upon completing the six weeks period, an employee who is a member of a health insurance fund may claim the sickness benefit (*Krankengeld*) from such a fund.¹³⁸⁷ South Africa could draw valuable lessons from the German experience in as far as sickness benefits are concerned. Firstly, sickness benefits under the German regime are, unlike in the case of South Africa, catered for separately from the unemployment insurance scheme. The advantage of this approach is that the unemployment insurance scheme can focus on ‘unemployment-specific issues’ such as preventing and combating unemployment. Additionally, South Africa could learn from the German approach and forbid entitlement to illness benefits by a contributor who is unemployed due to an illness arising from his or her own misconduct. After all, the exclusion of employees who are sick as a result of their own wrongdoing is in conformity with the principle that contributors who deliberately contribute towards their unemployment should not draw any benefits.

2.2.2.3. Maternity

The *Social Insurance Regulation (Reichsversicherungsordnung)* of 19 July 1911 and the *Maternity Protection Act (Mutterschutzgesetz)* of 24 January 1952 provide the statutory basis for the payment of maternity benefits (*Mutterschaftsgeld*) in Germany. In order to protect affected women from financial ruin during the period within which they are forbidden from working¹³⁸⁸ the law bestows the affected women with an entitlement to maternity benefit. The *Maternity Protection Act*, which applies to women who are in an employment

¹³⁸⁷ See Book V of the *Social Code*. This is of course subject to the fact that the employee concerned is still unable to work due to illness. The sickness benefit amounts to 70% of the normal salary (article 47(1) of Book V of the *Social Code*). Even so, it may not exceed 90% of the net salary. In addition, the sickness benefit for the same sickness is limited to 78 weeks over a three year period. An insured employee may claim sickness benefit for a maximum of 10 working days (or 20 working days for single parents) in a case whereby a child under 12 years is sick and requires supervision, care or assistance by the aforementioned employee (article 45 of Book V of the *Social Code*). There is a 25 working days per year (or 50 days working days per year for single parents) limitation for each insured parent (*ibid*). There is, in addition, no time limit in the case of dying children (*ibid*). See Schulte B “The impact of social security conventions: Germany” in Pennings F (ed) *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer (2006)) 115 at 117-119.

¹³⁸⁸ The *Maternity Protection Act* proscribes women from working in the last 6 weeks of pregnancy and within the 8 weeks after confinement (12 weeks in cases of premature or multiple births) (s 3(2) and 6 of the *Maternity Protection Act*).

relationship as well as female homeworkers or women equated with homeworkers, makes provision for the payment of a part of the salary of women during the aforementioned period.¹³⁸⁹ The maternity benefit for women who are members of a statutory health insurance (*gesetzlichen Krankenkasse*) is provided by the health insurance fund in accordance with the *Social Insurance Regulation* or the *Farmers Health Insurance Act* (*Gesetzes über die Krankenversicherung der Landwirte*) (1989).¹³⁹⁰ The maternity benefit (of up to a maximum of €10) for women who are not members of a statutory health insurance (but employed at the beginning of the statutory period of maternity leave or engaged in homework (*Heimarbeit*)) is paid by the Federal Insurance Office (*Bundesversicherungsamt*) in accordance with the *Social Insurance Regulation*.¹³⁹¹ The *Maternity Protection Act*, apart from the forgoing, makes provision for a top-up amount to the maternity benefit which an employee can claim from the employer.¹³⁹² This supplementary amount (the difference between the basic rate of €13 a day and the applicable take-home pay figure) may be claimed in a case whereby the average take-home pay could have been higher during the maternity leave.

2.2.2.4. Survivors

Survivors' benefits in Germany, as it is the case in many countries (South Africa and India included), are provided for in a variety of social security schemes. In the case of Germany the pension scheme as well as the employment injuries and diseases scheme be are the most notable. Survivors' benefits payable under the pension scheme are statutorily provided for by Book VI of the *Social Code*. Book VI of the *Social Code* applies to manual and white-collar workers and certain groups of self-employed persons.¹³⁹³ Voluntary insurance is, nonetheless, possible.¹³⁹⁴ Survivors' benefits – notably the widow's or widower's pension,¹³⁹⁵ orphans' pension¹³⁹⁶ and child-raising pension¹³⁹⁷ – are payable to the

¹³⁸⁹ S 11 of the *Maternity Protection Act*.

¹³⁹⁰ S 13(1) of the *Maternity Protection Act*.

¹³⁹¹ S 13(2) of the *Maternity Protection Act*.

¹³⁹² S 14 of the *Maternity Protection Act*.

¹³⁹³ Articles 1-3 of Book VI of the *Social Code*.

¹³⁹⁴ Article 7 of Book VI of the *Social Code*.

¹³⁹⁵ A widow's or widower's pension is payable to the surviving spouse of the deceased contributor (article 33(4) of Book VI of the *Social Code*). This is subject to the condition that the deceased spouse has contributed

dependants of the deceased insured person (e.g. surviving spouse and divorced spouse, as well as children). Provisions relating to survivors' benefits in the case of the employment injuries and diseases scheme are tabled in Book VII of the *Social Code*. The benefits provided under the employment injuries insurance include, among others, the following: the funeral allowance,¹³⁹⁸ widow's and widower's pension,¹³⁹⁹ and orphans' pension.¹⁴⁰⁰

2.2.3. Unemployment assistance

As pointed out earlier, 1 January 2005 saw the former unemployment assistance benefits and social assistance benefits being merged into one benefit called the unemployment benefit II (*Arbeitslosengeld II*). This benefit is provided in terms of a newly created Book II of the *Social Code* (SGB II). It is intended at providing a basic safety net for those needy and

towards the scheme for 60 months (article 46(1) of Book VI of the *Social Code*). The waiting period is, however, considered complied with in a situation whereby an insured person has died due to, *inter alia*, an employment injury (article 53 of Book VI of the *Social Code*). Furthermore, the marriage of the surviving spouse must have lasted for a minimum of one year and a surviving spouse must, *inter alia*, not have remarried (article 46(2) of Book VI of the *Social Code*). It is interesting to point out that a life partnership (*Lebenspartnerschaft*) is, for the purpose of widow's or widower's pension, seen in the same light as marriage (article 46(4) of Book VI of the *Social Code*).

¹³⁹⁶ Surviving dependant children of the deceased contributor to a pension scheme may claim the orphans' pension (*Waisenrente*) (article 48 of Book VI of the *Social Code*). Such surviving dependant children must, among other qualifying conditions, not be above 18 years of age (article 48(4) of Book VI of the *Social Code*). Notwithstanding that, the age limit may in certain situations (such as in the case of children who are still undergoing vocational training or children with severe disabilities) be raised to age 27 (*Ibid*).

¹³⁹⁷ This is a pension intended at providing divorcees raising children of an insured deceased with income (article 33(4) of Book VI of the *Social Code*). The child-raising pension is payable subject to, among others, the conditions that: the ex-spouse has contributed towards the insurance before his/her death, the divorced spouse has been divorced before 1 July 1977, and the divorced surviving spouse has not remarried (articles 47(1) and 33(4) of Book VI of the *Social Code*).

¹³⁹⁸ The funeral allowance is payable to the surviving dependants of an employee who died due to an occupational accident at work or an occupational illness. The allowance amounts to one seventh of the deceased employee's gross annual earnings at the time of such employee's death (article 64 of Book VII of the *Social Code*).

¹³⁹⁹ The surviving spouse of an employee who died due to an employment accident or an occupational illness is entitled to the widow's and widower's pension (unless and until he or she remarries). The value of the benefit is determined by, *inter alia*, the widow's or widower's age, earning capacity and the number of children (article 65 of Book VII of the *Social Code*).

¹⁴⁰⁰ Surviving children of an employee who died as a result of an employment injury or illness are entitled, provided that they are below 18 years, to an orphans' pension. The orphans' pension may be paid, as in the case of orphans' pensions provided by the pension insurance, to children who are above 18 but below 27 years of age who are, *inter alia*, undergoing vocational training or are unable to fend for themselves due to disabilities (article 67 of Book VIII of the *Social Code*). The value of the orphans' pension is 20% of the deceased's gross annual income if they still have one parent and 30% if they have lost both parents (article 68 of Book VII of the *Social Code*).

employable individuals between 15 and 65 years of age who are searching for work.¹⁴⁰¹ Individuals who are not considered fit to work, on the other hand, are catered for by a new social benefit (*Sozialgeld*).¹⁴⁰² The new social benefit is aimed at providing the qualifying individuals with the assistance for living costs (*Hilfe zum Lebensunterhalt*).¹⁴⁰³ These benefits are needs based. They are subject to a means test which includes the income and assets of the spouse or partner. Accordingly, they are not based on the previous earning(s) of the beneficiary.

Both the unemployment benefit II and the social benefit are financed from the tax revenues.¹⁴⁰⁴ The monthly rates of the unemployment benefit II and the social benefit are €345 in Western Germany and €331 in Eastern Germany.¹⁴⁰⁵ Apart from the foregoing amounts, there are additional amounts payable for any children in the household of the beneficiary or partners who are in need of financial assistance. In addition to the preceding amounts, an individual may claim reasonable costs for housing and heating.¹⁴⁰⁶ It should be noted that: “Whereas unemployment compensation usually was designed to allow jobseekers to maintain their standard of living, [the current regime] only guarantees them a level of benefits that is high enough to secure a subsistence level.”¹⁴⁰⁷ Beneficiaries of the unemployment benefit II are obliged to accept every lawful job offered to them irrespective of the pay provided. This approach, which tightened what should be considered an acceptable job, puts more pressure on unemployed persons to take up available employment.¹⁴⁰⁸ In this way, an attempt is made to reintegrate the unemployment benefit recipients into the labour market. Despite that, it is argued in some quarters that the fact that unemployment benefit II

¹⁴⁰¹ See article 1(1) of Book II of the *Social Code*.

¹⁴⁰² Book XII of the *Social Code*.

¹⁴⁰³ See Chapter 3 of Book XII of the *Social Code*.

¹⁴⁰⁴ Local authorities are financially responsible toward social benefit beneficiaries who are incapable to work.

¹⁴⁰⁵ Article 20(2) of Book II of the *Social Code*. These amounts are criticised as being too meagre to satisfy the constitutionally guaranteed life in dignity. See, for example, “Hartz IV violates the German constitution” – http://www.sahrawagenknecht.de/en/html/hartz_iv_violates_the_german_c.php.

¹⁴⁰⁶ Article 26 of Book XII of the *Social Code*.

¹⁴⁰⁷ Kemmerling A and Bruttel O *New Politics in German Labour Market Policy?: The Implications of the Recent Hartz Reforms for the German Welfare State* (Wissenschaftszentrum Berlin für Sozialforschung (2005) 15.

¹⁴⁰⁸ The tightening of what should be considered as suitable work, according to Kemmerling and Bruttel (Kemmerling A and Bruttel O *New Politics in German Labour Market Policy?: The Implications of the Recent Hartz Reforms for the German Welfare State* (Wissenschaftszentrum Berlin für Sozialforschung (2005)) 15-16), “may be the basis for a stronger ‘work first’ orientation in labour market policy, which would follow Anglo-Saxon traditions in which any job is seen as a better outcome than no job at all.”

recipients are compelled to accept any job irrespective of the wage that comes with it for the sake of keeping benefits could initiate a kind of wage dumping.¹⁴⁰⁹ Another issue to be noted is the likelihood of more people being employed in low income jobs in future.¹⁴¹⁰ In principle, this would not be a wrong development as the creation of a low wage sector is ideal for providing jobs to the currently disproportionately unemployed low skilled persons.¹⁴¹¹

An unemployed person cannot turn down a job simply because it does not fit such person's line of profession, education or the conditions are less favourable than those in the previous employment.¹⁴¹² This marks a "radical break from Germany's status- and occupation-oriented unemployment benefit regime."¹⁴¹³ The rejection of acceptable work could result in the benefit being cut by 30%.¹⁴¹⁴ The sanction is more severe in the case of beneficiaries who are under the age of 25 in that the benefit will be suspended for three months. Nevertheless, the effectiveness of sanctions in compelling unemployed benefit II beneficiaries to take on work has been questioned. It is argued by some commentators that those who are supposed to impose sanctions (i.e. employees of the placement services and the municipalities) are often reluctant to do so in practice.¹⁴¹⁵

2.2.4. Other measures fundamental to unemployment protection

The German government, at both the federal and state level, views unemployment as a major cause of poverty and social exclusion.¹⁴¹⁶ To this end, it strives towards the creation of employment as well as integration possibilities through the adoption of a combined economic

¹⁴⁰⁹ Lohse T *Hartz IV – The German "Word of the Year 2004" and the Country's Hope to Overcome its Problem of Unemployment* (Diskussionspapiere der Wirtschaftswissenschaftlichen Fakultät der Universität Hannover No. 311 (2005)) 12.

¹⁴¹⁰ *Ibid.*

¹⁴¹¹ *Ibid.*

¹⁴¹² Kemmerling A and Bruttel O *New Politics in German Labour Market Policy?: The Implications of the Recent Hartz Reforms for the German Welfare State* (Wissenschaftszentrum Berlin für Sozialforschung (2005) 8 and Ochel W "Hartz – Welfare to work in Germany" (2005) 2 *CESifo Dice Report* 18 at 21.

¹⁴¹³ *Ibid.*

¹⁴¹⁴ Article 31(1) of Book II of the *Social Code*.

¹⁴¹⁵ Ochel W "Hartz – Welfare to work in Germany" (2005) 2 *CESifo Dice Report* 18 at 22.

¹⁴¹⁶ Federal Republic of Germany *National Action Plan for Employment Policy 2004* (Federal Republic of Germany (2004)) 10.

and employment policy.¹⁴¹⁷ This policy, which is hailed as the basis of the German government's aspirations of strengthening social cohesion in its society, is geared at the reinforcement of social cohesion and social integration in Germany.¹⁴¹⁸ Apart from promoting integration into the labour market, it focuses on important policy areas such as, *inter alia*, social inclusion through general education and vocational training.¹⁴¹⁹ This it does by, among others, promoting the integration of persons with disabilities and immigrants.¹⁴²⁰

2.2.4.1. Creation and promotion of employment

In its quest to create and promote employment, the German government (federal government and the *Länder*) endeavours to, among others, foster the promotion of entrepreneurship.¹⁴²¹ Consequently, it supports entrepreneurship by cultivating the right climate for the creation of small and medium size enterprises (SMEs) through “the reduction in the minimum and maximum tax rates and in the sharp rise in the basic tax-free allowance as part of the three-stage tax reform and the flat-rate compensation of corporate tax on income tax.”¹⁴²² In addition, the *KfW-Mittelstandsbank* (which is a bank owned by a federal Body) provides low interest loans to entrepreneurs establishing their enterprises as well as SMEs.¹⁴²³ The aforementioned financial assistance is supported by a variety of information and consulting services aimed at advising start-up entrepreneurs.¹⁴²⁴ Noting that financial support and advice was insufficient on its own to aid in the creation of enterprises, the government launched an initiative to reduce the bureaucracy that faced the entrepreneurs who wished to establish their

¹⁴¹⁷ This, it is opined, is in the spirit of ILO instruments such as the *Employment Promotion and Protection against Unemployment Convention*.

¹⁴¹⁸ Federal Republic of Germany *National Action Plan for Employment Policy 2004* (Federal Republic of Germany (2004)) 10.

¹⁴¹⁹ *Ibid.*

¹⁴²⁰ *Ibid.*

¹⁴²¹ See Heseler H and Mückenberger U “The management of redundancies in Europe: The case of Germany” (1999) 13 *Labour* 183 at 225-227.

¹⁴²² Federal Republic of Germany *National Action Plan for Employment Policy 2004* (Federal Republic of Germany (2004)) 16.

¹⁴²³ *Ibid.*

¹⁴²⁴ *Ibid* 16-17.

own businesses.¹⁴²⁵ Furthermore, the government reorganised the labour market in such a way that it encourages the unemployed to set-up, on their own, their own businesses.¹⁴²⁶

2.2.4.2. (Re)integration of unemployed persons

Germany has a variety of measures aimed at the reintegration of the unemployed – particularly the long-term unemployed – into the labour market. These measures, which are intimately linked with the unemployment benefits, include those that relate to job placement and/or vocational training. Pursuant to the recent labour market reforms alluded to earlier, individuals have an obligation to register as job seekers as early as possible.¹⁴²⁷ The goal is to ensure that the process of placement on the labour market is set in motion as soon as possible.¹⁴²⁸ The job seekers are, apart from the foregoing, required to enter into an integration agreement with an employment agency.¹⁴²⁹ In addition, Germany has measures in place which are aimed at the integration of groups of persons who experience difficulties to enter the labour market, such as young people, immigrants, persons with (severe) disabilities, the aged and people with family responsibilities.¹⁴³⁰ These measures include, among others, the following: *young people* – integration measures targeted at the youth include, among others, vocational training; *immigrants* – integration measures directed at immigrants include the so-called systematic provision of upgrading skills for potentially employable immigrants as well as integration courses;¹⁴³¹ *persons with (severe) disabilities* – measures intended at enhancing the employment opportunities of person with (severe) disabilities include, *inter alia*, vocational training and measures aimed at encouraging companies to employ persons with (severe) disabilities;¹⁴³² *older persons* – measures aimed at integrating the aged (such as

¹⁴²⁵ *Ibid* 17.

¹⁴²⁶ *Ibid* 18.

¹⁴²⁷ ‘As early as possible’ in this regard refers to “as soon as they become aware that they loose their job.” Federal Republic of Germany *National Action Plan for Employment Policy 2004* (Federal Republic of Germany (2004)) 12.

¹⁴²⁸ Federal Republic of Germany *National Action Plan for Employment Policy 2004* (Federal Republic of Germany (2004)) 12.

¹⁴²⁹ Chapter 3 of Book II of the Social Code.

¹⁴³⁰ This is envisaged by, for instance, article 136 of the *Treaty establishing the European Community* and article 8(1) of the ILO *Employment Promotion and Protection against Unemployment Convention*.

¹⁴³¹ Federal Republic of Germany *National Action Plan for Employment Policy 2004* (Federal Republic of Germany (2004)) 28-29 and 34-35.

¹⁴³² *Ibid* 35-36.

skills upgrading, integration grants and part-time work) endeavour to promote the so-called active ageing by “keeping these persons in the workforce by offering them skills upgrading measures and...facilitating their reintegration into the workforce”;¹⁴³³ and *people with family responsibilities* – the goal of measures intended at the (re)integration of people with family responsibilities (such as the right to a place at a childcare facility for children between the age of three and the mandatory school-entry age, simultaneous parental leave by both parents and claim to part-time work) is to assist persons in striking a balance between work and family life.

Efforts to (re)integrate the unemployed into the labour market found in Germany are, to a large extent, closely linked with unemployment benefits. This, it is opined, highlights the close relationship between the unemployment benefits and the (re)integration measures. Hence, an unemployment benefit is not an end in itself. An unemployment benefit stands right between preventative and (re)integrative measures. It should be remembered that the goal of an unemployment protection system is (or should be) the prevention of unemployment. And once unemployment is unavoidable, it should minimise the effect of unemployment through an unemployment benefit (in cash and/or kind). The provision of an unemployment benefit should – as an appreciation of the value of employment to individuals, families and the community at large – be supported by (re)integrative measures. With the following in mind, it is submitted that South Africa (in this regard) could learn from the German experience. This line of reasoning is, as pointed out earlier, informed by the limited nature of the preventative and (re)integrative measures in the South African unemployment protection system.

2.2.4.3. Partnership approach

The German social partners support the government’s efforts to promote employment in Germany. Areas of their involvement include enhancing flexibility among companies while taking the employees’ interests into account; assisting in the promotion of business start-ups

¹⁴³³ Federal Republic of Germany *National Action Plan for Employment Policy 2004* (Federal Republic of Germany (2004)) 27.

through mentoring, sponsorship, collaborations etc; training initiatives such as vocational training and skills upgrading of staff; and creating equal opportunities and making work compatible with family life.¹⁴³⁴ This is, for the most part, in accordance with the 1998 Employment Guidelines Council Resolution (1997).¹⁴³⁵

2.3. Employment protection

2.3.1. Extraordinary dismissal and ordinary dismissal

The protection against dismissal in Germany is generally provided for in the *Civil Code* (*Bürgerliches Gesetzbuch*) and the *Protection against Dismissal Act* (*Kündigungsschutzgesetz*) of 10 August 1951. German labour law draws a line of distinction between two types of dismissals, namely ordinary dismissal (dismissal with notice) and extraordinary dismissal (dismissal without notice).

2.3.1.1. Ordinary dismissal

The *Protection against Dismissal Act* applies to enterprises where more than ten employees are employed,¹⁴³⁶ provided that an employee has been employed for an uninterrupted period longer than six months in that establishment.¹⁴³⁷ The *Protection against Dismissal Act* was, prior to 31 December 2003, applicable only to enterprises where more than five employees were employed. Although the *Protection against Dismissal Act* applies now to enterprises where more than ten employees are employed, it should nevertheless be noted that employees employed prior to January 2004 at enterprises with more than five but lesser than 11 employees will continue to enjoy the statutory protection they had before the reform. Nonetheless, this does not mean that employees in small businesses with ten or fewer employees are generally left without any sort of dismissal protection. Commenting on this issue Seifert and Funken-Hötzel point out that:

¹⁴³⁴ *Ibid* 51-53.

¹⁴³⁵ Also see ILOLEX “2004, Promoting employment: Chapter V – Involvement of the social partners in the design and implementation of policies” – accessed at <http://www.ilo.org>.

¹⁴³⁶ Cf s 23(1) of the *Protection against Dismissal Act*.

¹⁴³⁷ S 1(1) of the *Protection against Dismissal Act*.

“Generally speaking, the employer does not need a specific reason to dismiss one or several of its employees. However, the employers’ freedom to ‘fire’ is limited by the general clauses of public policy and good faith...these general clauses of civil law have to be interpreted in light of the employees’ constitutionally-guaranteed freedom of occupation. The employer therefore has to respect a minimum of social protection when dismissing employees. The only example the Court gives is that the employee’s confidence in the continuation of an employment relationship that has already existed for a long period of time should be taken into consideration...However, the precise extent of this constitutionally-guaranteed minimum dismissal protection in small businesses still remains unclear.”¹⁴³⁸

In accordance with the *Protection against Dismissal Act*, an ordinary dismissal is legally invalid if it is not based on the following grounds: an employee’s personality, the behaviour of an employee and “urgent operational requirements” of an employer:¹⁴³⁹

- (a) Dismissal on the grounds of an employee’s personality. The dismissal of an employee on the basis of an employee’s personality involves a situation whereby an employee is incapable of executing his or her job (satisfactorily). Such an inability to (satisfactorily) perform one’s job could be caused by a variety of reasons. These reasons include, among others, ill-health,¹⁴⁴⁰ old age and the lack of training.¹⁴⁴¹
- (b) Dismissal on the basis of the behaviour of an employee. This ground for dismissal relates to an employee’s conduct such as, *inter alia*, dishonesty, insubordination, theft, and arriving late at work without good grounds.¹⁴⁴² While it is true that an employee’s misconduct can be used as a ground of justification for dismissal, it is

¹⁴³⁸ Seifert A and Funken-Hötzel E “Wrongful dismissals in the Federal Republic of Germany” (2004) 25 *Comparative Labor Law and Policy Journal* 487 at 495-496.

¹⁴³⁹ S 1(2) of the *Protection against Dismissal Act*. These grounds are, to some extent, analogous to those contained in the ILO *Termination of Employment Convention* (1982). Germany is (as on 23 May 2006) yet to ratify this Convention.

¹⁴⁴⁰ See Seifert A and Funken-Hötzel E “Wrongful dismissals in the Federal Republic of Germany” (2004) 25 *Comparative Labor Law and Policy Journal* 487 at 497.

¹⁴⁴¹ See Eger T “Opportunistic termination of employment contracts and legal protection against dismissal in Germany and the USA” (2004) 23 *International Review of Law and Economics* 381 at 389-390 and Weiss M and Schmidt M *Labour Law and Industrial Relations in Germany* (Kluwer (2000)) 106-107.

¹⁴⁴² See Seifert A and Funken-Hötzel E “Wrongful dismissals in the Federal Republic of Germany” (2004) 25 *Comparative Labor Law and Policy Journal* 487 at 497-498.

normal for a dismissal to be preceded by, among others, a disciplinary hearing and/or a warning.¹⁴⁴³

- (c) Operational requirements of an employer.¹⁴⁴⁴ An employer may terminate an employee's contract of employment for economic reasons (e.g. the introduction of new technologies by the employer). The burden of proof to justify the dismissal, should the dismissal be challenged in court, is on the employer. The employer will have to prove the details of the economic situation as well as the need for the dismissal. It should be mentioned, however, that the decision to implement or not to implement organisational strategies culminating in the dismissal of an employee is not subject to judicial control as it is considered to be a part of the managerial prerogative.¹⁴⁴⁵

Apart from the foregoing, a dismissal which is based on discriminatory grounds is as a rule invalid.¹⁴⁴⁶ There are, in addition, certain categories of employees who enjoy a higher degree of protection against dismissal. These categories of employees include, among others, the following: pregnant women, mothers and employees on childcare leave; employees with disabilities; members of the works council; apprentices and employees on compulsory military training or community service.

- (a) Pregnant women, mothers and employees on childcare leave. The *Pregnancy and Maternity Act* of 24 January 1952 (*Mutterschutzgesetz*) prohibits the dismissal of a woman employee during pregnancy¹⁴⁴⁷ and until the end of four months after child

¹⁴⁴³ See Eger T "Opportunistic termination of employment contracts and legal protection against dismissal in Germany and the USA" (2004) 23 *International Review of Law and Economics* 381 at 390 and Weiss M and Schmidt M *Labour Law and Industrial Relations in Germany* (Kluwer (2000)) 107.

¹⁴⁴⁴ See Heseler H and Mückenberger U "The management of redundancies in Europe: The case of Germany" (1999) 13 *Labour* 183 at 213-214.

¹⁴⁴⁵ See Eger T "Opportunistic termination of employment contracts and legal protection against dismissal in Germany and the USA" (2004) 23 *International Review of Law and Economics* 381 at 390-391, Seifert A and Funken-Hötzel E "Wrongful dismissals in the Federal Republic of Germany" (2004) 25 *Comparative Labor Law and Policy Journal* 487 at 498-500 and Weiss M and Schmidt M *Labour Law and Industrial Relations in Germany* (Kluwer (2000)) 107-108.

¹⁴⁴⁶ Also see paragraph 2.1. on constitutional overview above.

¹⁴⁴⁷ A similar prohibition can be found in the *Termination of Employment Convention* (1982) and the *Maternity Protection Convention* (2000). Nevertheless, Germany is yet to ratify these instruments.

- birth.¹⁴⁴⁸ Apart from the foregoing, employees on childcare leave are statutorily protected against dismissal. An employer is prohibited by the *Benefits and Leave for Care of Children Act (Bundeserziehungsgeldgesetz)* of 6 December 1985 from dismissing an employee who is on childcare leave.¹⁴⁴⁹ As an exception to the general rule, an employer may dismiss an employee on childcare leave if continued employment is absolutely intolerable and the Land Office for Labour Inspection consents to such a dismissal.¹⁴⁵⁰
- (b) Employees with disabilities. Chapter 4 of Book IX of the *Social Code* makes provision for the protection of severely disabled employees against dismissal. Employers have an obligation to seek the approval of an office responsible for the integration of persons with disabilities (*Integrationsamt*) before giving a severely disabled employee a notice of termination.¹⁴⁵¹
- (c) Members of the works council. Members of the works council enjoy a higher degree of protection against dismissal. The protection provided to members of a works council runs up to one year after the mandate has expired.¹⁴⁵² Even so, a member of a works council may be extraordinarily dismissed during the period of protection. This is in the case where the works council agrees or, in the place of such an agreement, the employer's application to terminate the employment of a member of the works council¹⁴⁵³ is granted by the Labour Court.¹⁴⁵⁴
- (d) Employees on compulsory military training or community service. Employees on compulsory military training or community service cannot be dismissed. This protection, however, runs from the time of receipt of notice of the call-up

¹⁴⁴⁸ S 9 of the *Pregnancy and Maternity Act*.

¹⁴⁴⁹ S 18(1) of the *Benefits and Leave for Care of Children Act*.

¹⁴⁵⁰ *Ibid.*

¹⁴⁵¹ Article 85 of Book IX of the *Social Code*.

¹⁴⁵² S 15 of the *Protection against Dismissal Act*.

¹⁴⁵³ See, for further reading about the works council system in Germany, Weiss M "Labor law" in Zekoll J and Reimann M (eds) *Introduction to German Law* (2nd edition) (Kluwer (2005)) 299 at 310-312.

¹⁴⁵⁴ S 102(1) and (2) of the *Works Constitution Act (Betriebsverfassungsgesetz)* of 15 January 1972.

documentation until the end of service.¹⁴⁵⁵ It should be mentioned that an employee may, nonetheless, be extraordinarily dismissed for reasons not related to military or community service.

With the foregoing in mind, it should be noted that a period of notice which is related to the length of service is applicable in the case of ordinary dismissals. The period of notice, which should be in writing,¹⁴⁵⁶ is statutorily set according to length of service as follows: from 2 years of service, it is one month to the end of a calendar month; from 5 years of service, it is two months to the end of a calendar month; from 8 years of service, it is three months to the end of a calendar month; from 10 years of service, it is four months to the end of a calendar month; from 12 years of service, it is 5 months to the end of a calendar month; from 15 years of service, it is 6 months to the end of a calendar month; and from 20 years of service, it is 7 months to the end of a calendar month.¹⁴⁵⁷ Even so, it should be recalled that the minimum term of notice may be reduced by collective agreement.¹⁴⁵⁸

2.3.1.2. Extraordinary dismissal

An employment contract may, in accordance with the article 626 of the *Civil Code*, be cancelled without the observation of a period of notice if there are good grounds justifying such a dismissal. That is if there are reasons which, in the light of all the surrounding circumstances of the case and in weighing the interests of both parties to a contract of employment, render the continuation of the employment up to the expiry of the period of notice unacceptable for either of the parties.¹⁴⁵⁹ Albeit one may not generalise as all circumstances need to be taken into consideration, such reasons may be based on misconduct, incompetence or economic circumstances.¹⁴⁶⁰ Article 626(2) of the *Civil Code* obliges the party terminating the employment contract to promptly disclose the reason for

¹⁴⁵⁵ S 2 of the *Job Protection on Call-up to Perform Military Service Act (Arbeitsplatzschutzgesetz)* of 30 March 1957.

¹⁴⁵⁶ Article 623 of the *Civil Code*.

¹⁴⁵⁷ Article 622(2) of the *Civil Code*.

¹⁴⁵⁸ Weiss M and Schmidt M *Labour Law and Industrial Relations in Germany* (Kluwer (2000)) 103.

¹⁴⁵⁹ Article 626(1) of the *Civil Code*.

¹⁴⁶⁰ Weiss M and Schmidt M *Labour Law and Industrial Relations in Germany* (Kluwer (2000)) 104-105.

such termination in writing to the dismissed party upon request for same by the party. The rationale behind this provision is to ensure that employees are not left in any uncertainty.¹⁴⁶¹

2.3.2. Duty to consult the works council

Employers have a duty, prior to any dismissal (irrespective of whether the dismissal is ordinary or extraordinary), to consult the works council (*Betriebsrat*).¹⁴⁶² Failure to comply with this duty will result in the dismissal being null and void. The employer, as part of the consultation process, has to inform the works council about, *inter alia*, employees to be dismissed, the type of dismissal (that is whether it is ordinary or extraordinary), the reason for the dismissal, the date when the dismissal shall take effect and the selection criteria.¹⁴⁶³ The works council has the right to object to a dismissal.¹⁴⁶⁴ Such an objection can be made in a situation whereby continued employment is possible for an employee to be dismissed either in a vacant position available in the same enterprise or another establishment of the same employer or after re-training or further training which an employer could be reasonably expected to provide.¹⁴⁶⁵ Nonetheless, the objections of the works council have no particular legal implications.¹⁴⁶⁶ Another point to be noted is that the *Works Constitution Act* applies only to enterprises with at least five employees.¹⁴⁶⁷ To this end, the abovementioned procedural safeguard does not apply to enterprises comprising of less than five employees.¹⁴⁶⁸

¹⁴⁶¹ *Ibid* 105.

¹⁴⁶² S 102(1) *Works Constitution Act*. See Löwisch M “Job safeguarding as an object of the rights of information, consultation, and co-determination in European and German law” (2005) 26 *Comparative Labor Law and Policy Journal* 371.

¹⁴⁶³ S 17(2) of the *Protection against Dismissal Act*.

¹⁴⁶⁴ S 102(3) of the *Works Constitution Act*.

¹⁴⁶⁵ See Löwisch M “Job safeguarding as an object of the rights of information, consultation, and co-determination in European and German law” (2005) 26 *Comparative Labor Law and Policy Journal* 371 at 373.

¹⁴⁶⁶ See Seifert A and Funken-Hötzel E “Wrongful dismissals in the Federal Republic of Germany” (2004) 25 *Comparative Labor Law and Policy Journal* 487 at 493 and Heseler H and Mückenberger U “The management of redundancies in Europe: The case of Germany” (1999) 13 *Labour* 183 at 214.

¹⁴⁶⁷ S 1 of the *Works Constitution Act*.

¹⁴⁶⁸ Heseler H and Mückenberger U “The management of redundancies in Europe: The case of Germany” (1999) 13 *Labour* 183 at 229.

2.3.3. Severance pay

Section 1(a) of the *Protection against Dismissal Act* provides an employee who refrains from filing a complaint against his or her dismissal for operational reasons, with a claim to severance pay. This is subject to the condition that an employer has expressly based the dismissal on its operational reasons and specifically mentioned severance pay in the termination letter.¹⁴⁶⁹ The severance pay, as stipulated by section 1(a) of the *Protection against Dismissal Act*, shall amount to 0.5 of monthly earnings for each year of service. The *Protection against Dismissal Act* requires that, in determining the length of service, a period of more than six months be rounded up to a full year.¹⁴⁷⁰ Apart from the foregoing, it should be mentioned that both the employee and employer may request the court to award severance pay instead of reinstatement.¹⁴⁷¹ In practice, cases whereby employers have not exercised this option are said to be rare.¹⁴⁷² Hence one commentator remarked that: “Although the [Protection against Dismissal Act] is conceived to guarantee employment for an *unlawfully* dismissed person, in reality, it has developed into a mere severance pay system” (italics in the original).¹⁴⁷³

2.3.4. Additional measures for collective dismissals

2.3.4.1. Consultation

An employer has a duty to consult the works council before embarking on collective dismissals. The employer is required to provide the works council, prior to notifying the Labour Office about the intended redundancies, with the reasons for the collective dismissals, the precise number of employees to be made redundant, the selection criteria to be followed

¹⁴⁶⁹ Ueber T “Agenda 2010: Reform of German labour law: Impact on hiring and firing staff” (2004) 5 *German Law Journal* 137.

¹⁴⁷⁰ S 1(a) of the *Protection against Dismissal Act*.

¹⁴⁷¹ S 9 of the *Protection against Dismissal Act*. See Weiss M “The interface between constitution and labor law in Germany” (2005) 26 *Comparative Labor Law and Policy Journal* 181 at 190 and Heseler H and Mückenberger U “The management of redundancies in Europe: The case of Germany” (1999) 13 *Labour* 183 at 218.

¹⁴⁷² Körner M “German labor law in transition” (2005) 6 *German Law Journal* 805 at 809.

¹⁴⁷³ *Ibid.*

in identifying employees to be made redundant and, if applicable, the criteria to be used in calculating the severance payments, etc. Most importantly, an employer is required to deliberate with the works council on ways and means to avert dismissals or minimise their negative consequences.¹⁴⁷⁴ Any dismissal executed without the prior consultation of the works council is invalid.

2.3.4.2. Notification of a competent public authority

In addition to consultations with the works council, an employer has a duty to notify in writing the Labour Office about the intended collective dismissals.¹⁴⁷⁵ The employer is obliged to provide the Labour Office with information relating to, among others, the reasons for the proposed collective dismissals, the precise number of employees to be made redundant,¹⁴⁷⁶ the selection criteria to be followed in identifying employees to be made redundant and, if applicable, the criteria to be used in calculating the severance payments. Failure to notify the Labour Office could, upon being challenged by affected employees, result in each and every redundancy being declared invalid. The requirement that employers must notify the Labour Office, depending on the number of employees they intend to retrench, is ideal for South Africa if it is to be linked to broader unemployment protection measures such as those that are aimed at the (re)integration of the unemployed into the labour market. At the moment, the South African unemployment protection system has limited measures aimed at the (re)integration of retrenched individuals into the labour market.

2.3.4.3. Selection criteria

The selection of employees to be made redundant must be done on the basis of the social selection criteria (*Sozialauswahl*).¹⁴⁷⁷ In accordance with the social selection criteria the employees to be selected for dismissal should be those who will suffer the least. The social

¹⁴⁷⁴ S 17(2) of the *Protection against Dismissal Act*.

¹⁴⁷⁵ S 17 of the *Protection against Dismissal Act*.

¹⁴⁷⁶ See, as regards the number of employees that may be made redundant, s 17(1) of the *Protection against Dismissal Act*.

¹⁴⁷⁷ See Seifert A and Funken-Hötzel E “Wrongful dismissals in the Federal Republic of Germany” (2004) 25 *Comparative Labor Law and Policy Journal* 487 at 499-500.

selection principle is restricted to four criteria. That is the length of service within an undertaking, age, family responsibilities and severe disability of an employee.¹⁴⁷⁸

2.3.4.4. Reconciliation of interests and a social plan

Employers employing more than 20 employees have an obligation, in good time, to provide the works council with comprehensive information about the planned corporate changes which could have substantial disadvantages for the labour force or a substantial part thereof.¹⁴⁷⁹ An employer envisaging the aforesaid social changes is required to conclude a ‘reconciliation of interests’ (*Interessenausgleich*)¹⁴⁸⁰ with the works council and carry out a ‘social plan’ (*Sozialplan*).¹⁴⁸¹ A social plan is a special work agreement aimed at mitigating the adverse social consequences of an entrepreneurial decision.¹⁴⁸² A social plan could make provision for compensation and/or measures such as the re-training, transfer of employees to other establishments of an enterprise and so forth.¹⁴⁸³

¹⁴⁷⁸ S 1(3) of the *Protection against Dismissal Act*.

¹⁴⁷⁹ S 111 of the *Works Constitution Act*.

¹⁴⁸⁰ See Heseler H and Mückenberger U “The management of redundancies in Europe: The case of Germany” (1999) 13 *Labour* 183 at 221.

¹⁴⁸¹ Ss 112 and 112(a) of the *Works Constitution Act*. It should be noted that the foregoing section makes provision for a threshold for collective dismissals which is different from that of s 17(1) of the *Protection against Dismissal Act*.

¹⁴⁸² Eger T “Opportunistic termination of employment contracts and legal protection against dismissal in Germany and the USA” (2004) 23 *International Review of Law and Economics* 381 at 392 and Weiss M and Schmidt M *Labour Law and Industrial Relations in Germany* (Kluwer (2000)) 204.

¹⁴⁸³ See Weiss M and Schmidt M *Labour Law and Industrial Relations in Germany* (Kluwer (2000)) 204 and Heseler H and Mückenberger U “The management of redundancies in Europe: The case of Germany” (1999) 13 *Labour* 183 at 222.

3. (UN)EMPLOYMENT PROTECTION IN INDIA

3.1. Constitutional overview

India is a constitutional federal democracy country.¹⁴⁸⁴ The Constitution of India, enacted on 26 November 1949, is the supreme law of India.¹⁴⁸⁵ In addition, the rights and freedoms entrenched in the Constitution of India bind the state. The Constitution of India defines ‘the state’ for the purpose of the chapter making provision for fundamental rights (Part III) to include “the Government and Parliament of India and the Government and the legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.”¹⁴⁸⁶ It is on account of the binding effect of the

¹⁴⁸⁴ India consists of 29 states and 6 union territories, is spread over a land area totalling 3, 287, 263 sq km (inclusive of the India-administered Kashmir) (Economist Intelligence Unit *India: Country Profiles 2003* (Economist Intelligence Unit (2003)) 3). With a population just above 1 billion (*ibid*), India is the second most populated country in the world (second to China). Similarly to most developing countries, India is characterised by a *huge informal sector* (sometimes referred to as the unorganised sector in India) (see Saini DS “Labour organization and labour relations in India: Implications for poverty alleviation” in Williams L *et al* (eds) *Law and Poverty: The Legal System and Poverty Reduction* (Zed (2003)) 269 at 269 and Unni J and Rani U *Insecurities of Informal Workers in Gujarat, India* (ILO (2002))); *poverty* ((more than 30% of the Indian population is estimated to live below or around the poverty line) Sinha P “Representing labour in India” (2004) 14 *Development in Practice* 127 at 127-128, Saini DB “India” in Van Eeckhoutte W (ed) *Social Security Law* (Kluwer (2001)) 33, Iyer SV “Social security in India: Some issues and options” *Critical Reflections on State Human Development Reports* (GOA, 12-14 December 2003) – accessed at <http://goa.undp.org.in/resources/GOA%20DR.IYER2003.pdf>, Mehta AK and Shah A “Chronic poverty in India: Incidence, causes and policies” (2003) 31 *World Development* 491 and Mehta AK and Shah A *Chronic Poverty in India: Overview Study* (Chronic Poverty Research Centre Working Paper No. 7) – accessed at <http://www.chronicpoverty.org/pdfs/india.pdf>); *income inequality*; *unemployment* and *underemployment*. In general, India’s human development indicators are ranked amongst some of the lowest in the world (see Economist Intelligence Unit *India: Country Profiles 2003* (Economist Intelligence Unit (2003)) 24 and Jain S “Basic social security in India” in Van Ginneken W (ed) *Social Security for the Excluded Majority: Case Studies of Developing Countries* (ILO (1999)) 37 at 38). In addition, female-headed households tend to be poorer (Dasgupta S *Organizing for Socio-Economic Security in India* (ILO (2002)) 1). Despite the foregoing unsatisfactory socio-economic realities, India’s formal social security system, just like that of South Africa, has a limited scope of coverage (see, for example, Subrahmanya RKA “Adapting social security schemes to the challenges of a long life society: The Indian experience” Paper presented at the 4th International Research Conference on Social Security, Antwerp, 5-7 May 2003, Unni J and Rani U “Social protection for informal workers in India: Insecurities, instruments and institutional mechanisms” (2003) 34 *Development and Change* 127 and Dasgupta S *Organizing for Socio-Economic Security in India* (ILO (2002)) 1).

¹⁴⁸⁵ As Anand (Anand AS “Justice N.D. Krishna Rao Memorial Lecture Protection of Human Rights – Judicial obligation or judicial activism” (1997) 7 *Supreme Court Cases (Journal)* 11 – accessed at <http://www.ebc-india.com/lawyer/articles/97v7a2.htm>) puts it: “The Constitution being the suprema lex, every institution created under the Constitution is expected to respect its command and no organ or instrumentality of the Government, not President, not the Prime Minister not Parliament, not the policeman in uniform, not even the Judge, can ignore it. Its words are law which every State instrumentality must respect and enforce.”

¹⁴⁸⁶ Article 12 of the Constitution of India. This definition of ‘the state’ has been, over the years, interpreted broadly by Indian courts to include, among others, the state President (*Haroobhai v State* AIR 1967 Guj. 229),

Constitution on the state that the state is barred from enacting laws which are inconsistent with or in derogation of the fundamental rights. Article 13(2) of the Constitution of India prohibits the state from enacting laws¹⁴⁸⁷ which take away or abridge fundamental rights. Laws enacted in contravention of article 13 are void to the extent of the contravention. The Constitution of India embodies a variety of human rights.¹⁴⁸⁸ These human rights are divided into two categories, i.e.: fundamental rights (Part III of the Constitution of India) and directive principles of state policy (Part IV of the Constitution of India) (hereinafter directive principles). Fundamental rights enshrined in the Constitution of India are judicially enforceable.¹⁴⁸⁹ They include, *inter alia*, the right to equality¹⁴⁹⁰ and associated freedoms (which include speech and expression;¹⁴⁹¹ association;¹⁴⁹² movement;¹⁴⁹³ residence;¹⁴⁹⁴

Income Tax Department (*Bidi Supply Co. v Union of India* AIR 1956 479 (484)), Railway Board (*Railway Board v Observer Publication* AIR 1972 SC 1792) and banks (*In J.C. Sachdev v Reserve Bank of India* (1973) II Lab L.J. 204, *S. Mohan v P. and E.P. States' Union* AIR 1954 Pepsu 136, *Geeta v Central Bank of India*, Bombay 1978 Lab I.C 1271 and *State Bank of India v Kalpaka Transport Co.* AIR 1979 Bom. 250).

¹⁴⁸⁷ According to article 13(3)(a) of the Constitution of India, the word 'law' includes any ordinance, order, by-law (see, for example, *Rashid Ahmad v Municipal Board, Kairana* AIR 1950 SC 163), rule (see, for example, *Partap Singh v State of Punjab* AIR 1963 Punj. 298 (DB)), regulation (see, for example, *Yengal Venkatasra Reddy v State* AIR 1951 Hyd. 64 (DB) and *Showkat-un-Nissa Begunn v State of Hyderabad* AIR 1950 Hyd. 20 (FB)), notification (see, for example, *F.N. Balsara v State of Bombay* AIR 1951 SC 318, *Edward Mills v State of Ajmer* AIR 1955 SC 25, *Ram Krishna v Justice Tendolkar* AIR 1958 SC 538), custom or usage having in the territory of India the force of law.

¹⁴⁸⁸ Anand (Anand AS "Justice N.D. Krishna Rao Memorial Lecture Protection of Human Rights – Judicial obligation or judicial activism" (1997) 7 *Supreme Court Cases (Journal)* 11 – <http://www.ebc-india.com/lawyer/articles/97v7a2.htm>) describes the concept 'human rights' as follows: "Human rights" are those rights which inhere in every human being by virtue of being a person. These are nothing but the modern name of what had been traditionally known as "natural rights" i.e. rights bestowed upon human beings by nature. "Human rights" are based on mankind's increasing demand for a decent civilized life in which the inherent dignity of each human being is well respected and protected. Human rights are fundamental to our very existence without which we cannot live as human beings. The basic human rights constitute what might be called "sacrosanct rights" from which no derogation can be permitted in a civilised society. The bare necessities, the minimum and basic requirements which are essential and unavoidable for a person are the core of human rights concept. Human rights are universal and cut across all national boundaries and political frontiers." Henkin, on the other hand, describes 'human rights' as "...claims which every individual has, or should have, upon the society in which she or he lives. To call them human rights suggests that they are universal; they are the due of every human being in every human society. They do not differ with geography or history, culture or ideology, political or economic system or stage of development. They do not depend on gender or race, class or 'status'. To call them 'rights' implies that they are claims 'as of right' not merely appeals to grace, or charity or brotherhood or love; they need not be earned or deserved. They are more than aspirations or corresponding obligation in some political order under some applicable law, if only in a moral order under a moral law. When used carefully, 'human rights' are not some abstract, inchoate 'good'. The rights are particular, defined, and familiar, reflecting respect for individual dignity and a substantial measure of individual autonomy, as well as a common sense of justice and injustice" (Henkin L "Rights here and there" (1981) 81 *Columbia Law Review* 1582 at 1582).

¹⁴⁸⁹ Article 32 of the Constitution of India.

¹⁴⁹⁰ See articles 14, 15 and 16 of the Constitution of India.

¹⁴⁹¹ Article 19(1)(a) of the Constitution of India.

¹⁴⁹² Article 19(1)(c) of the Constitution of India.

profession, trade and business;¹⁴⁹⁵ protection of life and personal liberty and religion¹⁴⁹⁶). The Constitution of India provides remedies for the enforcement of fundamental rights it confers.¹⁴⁹⁷ Unlike that of South Africa, it has no general limitation clause. However, “[a]ll [fundamental] rights present in the Articles 13-35 of the Indian Constitution are subject to

¹⁴⁹³ Article 19(1)(d) of the Constitution of India.

¹⁴⁹⁴ Article 19(1)(e) of the Constitution of India.

¹⁴⁹⁵ Article 19(1)(f) of the Constitution of India.

¹⁴⁹⁶ Article 21 of the Constitution of India.

¹⁴⁹⁷ For example, article 32(1) of the Constitution of India guarantees the right to enforce the fundamental rights it confers at the Supreme Court. The inclusion of article 32 (in the Constitution of India), which is also a fundamental right, is essential. This is because it is meaningless to confer fundamental rights without simultaneously providing adjudication and enforcement mechanisms to be invoked in the event of any violation of the aforementioned rights. As Jaswal (Jaswal PS “Public accountability for violation of human rights and judicial activism in India: Some observations” (2002) 3 *Supreme Court Cases (Journal)* 6 – <http://www.ebc-india.com/lawyer/articles/2002v3a2.htm>) correctly points out: “It is the remedy, which makes the right real. If there is no remedy there is no right at all.” The Supreme Court has the power, in its quest to enforce the fundamental rights, to issue directions or orders or writs (article 32(2) of the Constitution of India). The power enjoyed by the Supreme Court to enforce fundamental rights may be conferred on any other court through an act of parliament. The powers so transferred may only be exercised within the local limits of the jurisdiction of the court concerned (article 32(3) of the Constitution of India). These powers, bestowed by article 32 on Indian Courts, paved a way for some innovation from the bench. As one commentator asserts, they “helped the courts to develop free from the constraints within which the English law of prerogative writs operated” (Sathe SP “Judicial enforcement of socio-economic and cultural rights” Paper prepared for the First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 1-3 November 2002). Furthermore, they provided the courts with some kind of a leeway to create new remedies ‘to suit the exigencies of the situation’ (Sathe SP “Judicial enforcement of socio-economic and cultural rights” Paper prepared for the First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 1-3 November 2002 and Hidayatullah M (ed) *Constitutional Law of India (Volume 1)* (Arnold-Heinemann (1984)) 613). Examples of the new remedies created by Indian Courts include, among others, the awarding of compensation for the violation of fundamental rights. These awards are issued without prejudice to the aggrieved person’s right to launch a civil suit against the person who violated his or her fundamental rights (Sathe SP “Judicial enforcement of socio-economic and cultural rights” Paper prepared for the First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 1-3 November 2002 and Saini DB “India” in Van Eeckhoutte W (ed) *Social Security Law* (Kluwer (2001)) 31. See, for example, *Rudul Sah v State of Bihar* (1983) 4 SCC 141, *M. Hongray v Union of India* (1984) 3 SCC 82 and *Nilabati Behera v State of Orissa* (1993) 2 SCC 746). Another remedy is that of seeking enforcement of fundamental rights by means of a letter to a Supreme Court judge without an accompanying affidavit (Saini DB “India” in Van Eeckhoutte W (ed) *Social Security Law* (Kluwer (2001) 31). See, for example, *Sheela Barse v State of Maharashtra* (1983) 2 SCC 96 and *Sunil Batra v Delhi Admn.* (1978) 4 SCC 494). These new remedies bring the enforceability of fundamental rights within the reach of individuals – particularly the indigent (Anand AS “M.C Bhandari Memorial Lecture – Public interest litigation as aid to protection of human rights” (2001) 7 *Supreme Court Cases (Journal)* 1 – accessed at <http://www.ebc-india.com/lawyer/articles/2001v7a1.htm>). They do so by doing away with long delays and high expenses involved in litigation which at times prevent the poorest of the poor from enforcing their constitutionally guaranteed rights. It is for this reason that, for example, the awarding of compensation as a remedy has been hailed as a “form of social security to the poor in the Indian context” (Saini DB “India” in Van Eeckhoutte W (ed) *Social Security Law* (Kluwer (2001)) 32). This is primarily because of a fact, highlighted in *Bihar Legal Support Society v Chief Justice of India* (1986) 4 SCC 767, that: “...the weaker sections of Indian humanity have been deprived of justice for long, long years: they have had no access to justice on account of their poverty, ignorance and illiteracy. They are not aware of the rights and benefits conferred upon them by the Constitution and the law. On account of their socially and economically disadvantaged position they lack the capacity to assert their rights and they do not have the material resources with which to enforce their social and economic entitlements and combat exploitation and injustice.”

‘reasonable limitations’.”¹⁴⁹⁸ The directive principles differ significantly from the fundamental rights in the sense that: they are not enforceable in courts,¹⁴⁹⁹ they require to be implemented by legislation;¹⁵⁰⁰ and courts cannot declare law as void on the ground that it infringes any of the directive principles.¹⁵⁰¹ As the courts have demonstrated, it is, however, possible for courts to give effect to some of the directive principles in combination with fundamental rights.¹⁵⁰² Directive principles are fundamental to the governance of India and

¹⁴⁹⁸ Jagannath SV “The state of rights in contemporary India” – accessed at http://www.columbia.edu/cu/ipsg/eld/eld_sjagan.html

¹⁴⁹⁹ The effect of the unenforceability of directive principles (hereinafter directive principles) is that they do not create any justiciable rights in favour of individuals.

¹⁵⁰⁰ Directive principles are not independently justifiable unless there is a piece of legislation enacted in pursuance to them. See *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161 and Singh MP “Are articles 15(4) and 16(4) fundamental rights?” (1994) 3 *Supreme Court Cases (Journal)* 33 – <http://www.ebc-india.com/lawyer/articles/94v3a2.htm>.

¹⁵⁰¹ Basu DD *Constitutional Law of India* (6th edition) (Prentice-Hall of India (1991)) 125.

¹⁵⁰² See *M.H. Hoskot v State of Maharashtra* (1978) 3 SCC 544, *People’s Union for Democratic Rights v Union of India* (1982) 3 SCC 235, *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161, *Mohini Jain v State of Karnataka* (1992) 3 SCC 666, and *Unni Krishnan v State of A.P* (1993) 1 SCC 645. It could be asked what the nature of the relationship between directive principles and fundamental rights is. Ascertaining the true nature of the relationship between fundamental rights and the directive principles has, since the inception of the Constitution of India, proved to be a tedious exercise. The Constitution of India itself does not shed much light apart from separating the two into two parts as well as spelling it out in unequivocal terms that fundamental rights are enforceable whereas directive principles are not. This has been a source of constant legal debates in India. At the heart of these debates lay the question whether the directive principles had the same status in the Constitution of India as the fundamental rights (see, for example, Singh MP “The statics and the dynamics of the fundamental rights and the directives principles – A human rights perspective” (2003) 2 *Supreme Court Cases (Journal)* 1 – accessed at <http://www.ebc-india.com/lawyer/articles/2003v5a4.htm> and Minattur J “The unenforceable directives in the Indian Constitution” (1975) 1 *Supreme Court Cases (Journal)* 17 – accessed at <http://www.ebc-india.com/lawyer/articles/2003v5a4.htm>). Addressing this question required some innovative interpretation of the Constitution by the Indian courts – otherwise known as judicial activism (see, for an interesting discussion of the concept of judicial activism, Rao MN “Judicial activism” (1997) 8 *Supreme Court Cases (Journal)* 1 – accessed at <http://www.ebc-india.com/lawyer/articles/97v8a1.htm>). Judicial activism should be understood against the perspective that: “The function of the higher courts in [India] has not been limited to exploring what the Constitution-makers meant when they wrote those words but also to develop and adapt the law so as to meet the challenges of contemporary problems of the society and respond to the needs of the society. The Constitution cannot be a living and dynamic instrument if it lives in the past only and does not address the present and the future” (Anand AS “Justice N.D. Krishna Rao Memorial Lecture Protection of Human Rights – Judicial obligation or judicial activism” (1997) 7 *Supreme Court Cases (Journal)* 11 – accessed at <http://www.ebc-india.com/lawyer/articles/97v7a2.htm>). In addition, it should be appreciated that: “When we talk about a Constitution, it is important to bear in mind that the Constitution, though by itself an important document, is after all cold print on a piece of paper. What is important to remember is the system the Constitution seeks to introduce and the way that system works. The Constitution no matter how well crafted it is, will not be able to deliver the goods unless the system which it introduces functions effectively to realise the dreams of the founding fathers of the Constitution. When we talk of the Constitution as living law it is usually understood to refer to the doctrines and understandings that the courts have invented, developed, spread and applied to make the Constitution work in every situation. Unless life can be pumped into the cold print of the Constitution to keep it vibrant at all times it shall cease to be a living law. Generally speaking, this role of pumping life is assigned to the higher courts, more particularly under a Constitution which has a separation of powers at its core. The Constitution of a State essentially reflects the aims and aspirations of the people who gave to themselves the Constitution. It is well accepted that while the *Bill of Rights* (like the Chapter on

the state of India has an obligation to apply them in making laws.¹⁵⁰³ The directive principles provide for, *inter alia*, the following: the promotion of welfare of the people;¹⁵⁰⁴ principles of

Fundamental Rights in the Constitution of India) is the conscience of the Constitution – an independent judiciary is its conscience-keeper” (italics in the original) (Anand AS “Justice N.D. Krishna Rao Memorial Lecture Protection of Human Rights – Judicial obligation or judicial activism” (1997) 7 *Supreme Court Cases (Journal)* 11 – accessed at <http://www.ebc-india.com/lawyer/articles/97v7a2.htm>). Notwithstanding the foregoing, the legal question concerning the relationship between enforceable fundamental rights and unenforceable directive principles has, as shown below, clearly illustrated the importance and role of courts in breathing life into what could otherwise be perceived as a dead document. This is conspicuous particularly when one examines the manner in which the Indian courts interpreted fundamental rights and directive principles in their judgments. Shortly after the coming into effect of the Constitution of India, the Supreme Court was presented with an opportunity, in *State of Madras v Champakam Dorairajan* (AIR 1951 SC 226), to clarify the nature of the relationship between fundamental rights and the directive principles. The Supreme Court of India held that the directive principles were subservient to the fundamental rights. This meant that in the event of a conflict between fundamental rights and directive principles, the former would prevail. The foregoing approach, which held directive principles to be subsidiary to fundamental rights, was premised on the fact that fundamental rights were justiciable whereas the directive principles were not (see Singh MP “The statics and the dynamics of the fundamental rights and the directives principles – A human rights perspective” (2003) 2 *Supreme Court Cases (Journal)* 1 – accessed at <http://www.ebc-india.com/lawyer/articles/2003v5a4.htm>). The Supreme Court’s stance on the nature of the relationship between fundamental rights and directive principles was later changed in *Minerva Mills Ltd v Union of India* ((1980) 3 SCC 625). In the *Minerva Mills Ltd* case the Supreme Court elevated directive principles to the same level as fundamental rights by holding that “harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution” (at 654, paragraph 56). Ever since the *Minerva Mills Ltd* case some directive principles have been incorporated into the fundamental rights through judicial interpretation (see, for example, *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) 1 SCC 608, *Delhi Transport Corporation v DTC Mazdoor Congress* 1991 Supp (1) SCC 600, *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545, *Consumer Education and Research Centre v Union of India* (1995) 3 SCC 42 and *Air India Statutory Corporation v United Labour Union* (1997) 9 SCC 377) or through constitutional amendments (e.g., the Constitution (Eighty-sixth Amendment) Act, 2002 introduced the right to education into the fundamental rights). Most recently the National Commission to Review the Working of the Constitution (of India) (National Commission to Review the Working of the Constitution (of India) *Report of the National Commission to Review the Working of the Constitution* – accessed at <http://lawmin.nic.in/ncrwc/finalreport.htm>) has recommended the adaptation of some of the directive principles into fundamental rights. Despite being laudable, these developments have their disadvantage. As Singh emphasises: “In this process [of converting or incorporating directive principles into fundamental rights], of course, some of the DPs [directive principles], which are non-justiciable, get converted into justifiable FRs [fundamental rights]. But this selective transfer of important DPs to the FRs implies not only the primacy of the FRs over DPs but also weakens the position of DPs. Slowly DPs will be left only with those provisions which do not require immediate attention or matter much. This disturbs the balance between the FRs and DPs, which the Court has held as one of the basic features of the Constitution in *Minerva Mills*. Indirectly, therefore, it goes against the basic structure of the Constitution. Such amendments must, therefore, fall foul of the basic structure doctrine” (Singh MP “The statics and the dynamics of the fundamental rights and the directives principles – A human rights perspective” (2003) 2 *Supreme Court Cases (Journal)* 1 – accessed at <http://www.ebc-india.com/lawyer/articles/2003v5a4.htm>).

¹⁵⁰³ Article 37 of the Constitution of India. The rationale behind the directive principles, so it is argued, is to “ensure ‘distributive justice’ for the removal of inequalities and disabilities and to achieve a fair division of wealth amongst the members of the society.” (National Commission to Review the Working of the Constitution (of India) *Report of the National Commission to Review the Working of the Constitution* – accessed at <http://lawmin.nic.in/ncrwc/finalreport.htm>).

¹⁵⁰⁴ Article 38 of the Constitution of India. In accordance with this directive, the state has a duty to “strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life” (article 38(1)). In

policy to be followed by the state;¹⁵⁰⁵ equal justice and free legal aid;¹⁵⁰⁶ right to work, to education and to public assistance in certain cases;¹⁵⁰⁷ provision for just and human conditions of work and maternity relief;¹⁵⁰⁸ living wage for workers;¹⁵⁰⁹ provision for free and compulsory education for children;¹⁵¹⁰ and the duty of the state to raise the level of nutrition and the standard of living and to improve public health.¹⁵¹¹ Despite the foregoing, the Constitution of India, contrary to the Constitution of South Africa, does not make any implicit provision for an enforceable right to access to social security. Nonetheless, it is undoubtedly geared towards the improvement of the welfare of the Indian population. This is elaborately clear from the basic freedoms and rights entrenched as fundamental rights and the directive principles in the Constitution of India.¹⁵¹²

addition, the state is obliged to strive to minimise the inequalities in income and endeavour to eliminate inequalities in status (article 38(2)).

¹⁵⁰⁵ Article 39 of the Constitution of India provides a list of principles of policy which the state should direct itself towards their attainment. These policy principles include, among others, the following: that the citizens, men and women equally, have the right to an adequate means of livelihood; that there is equal pay for equal work for both men and women; and that the health and strength of workers, men and women, and the tender age of children are not abused.

¹⁵⁰⁶ Article 39A of the Constitution of India.

¹⁵⁰⁷ Article 41 of the Constitution of India imposes a duty on the state to make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want. This duty is, nevertheless, subject to the state's economic capacity and development.

¹⁵⁰⁸ The state has, in accordance with article 42 of the Constitution of India, a duty to make provision for securing just and humane conditions of work and for maternity relief.

¹⁵⁰⁹ Article 43 of the Constitution of India imposes a duty on the state to endeavour to secure a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities for all workers. In its quest to satisfy the foregoing duty, the state could, *inter alia*, make use of legislation or economic organisation.

¹⁵¹⁰ Article 45 of the Constitution of India.

¹⁵¹¹ The state is required, in terms of article 47 of the Constitution of India, to realise the level of nutrition and the standard of living of its people.

¹⁵¹² Fundamental rights expand on the aspirations of the Indian people (see, for example, Rao PP "Basic features of the Constitution" (2000) 2 *Supreme Court Cases (Journal)* 1 – accessed at <http://www.ebc-india.com/lawyer/articles/2000v2a1.htm>, Palkhivala NA "The fundamental rights case: Propositions submitted before Supreme Court" (1973) 4 *Supreme Court Cases (Journal)* 1 – accessed at <http://www.ebc-india.com/lawyer/articles/73v4a1.htm> and Hidayatullah M (ed) *Constitutional Law of India (Volume 1)* (Arnold-Heinemann (1984)) 14-31). The Indian populace pledges, in the Preamble of the Constitution of India, to secure to all the citizens of India justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (of status and opportunity); and promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the Nation. The directive principles, on the other hand, as some commentators put it, represent the ideal of the welfare state (Saini DB "India" in Van Eeckhoutte W (ed) *Social Security Law* (Kluwer (2001)) 32, Rao PP "Basic features of the Constitution" (2000) 2 *Supreme Court Cases (Journal)* 1 – accessed at <http://www.ebc-india.com/lawyer/articles/2000v2a1.htm> and Ahmadi AM "Keynote: At the inaugural function of the Golden Jubilee Celebrations of the Constitution" (1997) 2 *Supreme Court Cases (Journal)* 18 – accessed at <http://www.ebc-india.com/lawyer/articles/97v2a4.htm>). This assertion is indeed logical – particularly in the light of the directive principles directed at social risks such as those provided in a table (Indian Constitution – Directive principles of state policy and protective measures of

3.2. Unemployment protection

In India different schemes make provision for unemployment-related benefits such as sickness and maternity benefits.¹⁵¹³ This is different from the South African approach where

social security) below. Apart from the foregoing pronouncements, the goal of the Constitution of India of securing the basic needs of the Indian people has been widely reflected upon by the Indian courts in their interpretation of the fundamental rights and the directive principles. The broad interpretation which the Indian courts attached to the right to life, which often incorporated a variety of directive principles, provides a perfect example. In *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (at 618-619, paragraph 8) the court pointed out that: “The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing [...] with fellow human beings. The magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights.” The courts have gone further on a number of occasions to interpret the right to life to include the right to work or the right to a livelihood. In *Olga Tellis v Bombay Municipal Corporation* (at 572, paragraph 32) the court remarked that: “The question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life by article 21 is wide and far reaching...An equally important facet of that is the right to livelihood because no person can live without the means of living, that is, the means of livelihood.” In *Consumer Education and Research Centre v Union of India* (at 68, paragraph 22) the court interpreted the meaning of the expression ‘life’ as guaranteed by article 21 of the Constitution of India in the following terms: “The expression ‘life’ assured in article 21 of the Constitution does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure.” The broad interpretation of the right to life does not purport, however, that the right to work or livelihood, for example, is absolute. The availability of resources, for example, limits the scope within which the right to work or livelihood could be secured (see *Delhi Development Horticulture Employees’ Union v Delhi Administration* ((1992) 4 SCC 99). In *K. Rajendran v State of Tamil Nadu* ((1982) 2 SCC 273, at 294, paragraph 34) the court observed that: “It is no doubt true that article 38 [State to secure a social order for the promotion of welfare of the people] and article 43 [living wage for workers] of the Constitution [of India] insist that the State should endeavour to find sufficient work for the people so that they may put their capacity to work into economic use and earn a fairly good living. But these articles do not mean that everybody should be provided with a job in the civil service of the State and if a person is provided with one he should not be asked to leave even for a just cause. If it were not so, there would be justification for a small percentage of the population being in Government service and in receipt of regular income and a large majority of them remaining outside with no guaranteed means of living. It would certainly be an ideal state of affairs if work could be found for all the able-bodied men and women and everybody is guaranteed the right to participate in the production of national wealth and to enjoy the fruits thereof. But we are today far away from the goal. The question whether a person who ceases to be a government servant according to law should be rehabilitated by being given alternative employment is, as the law stands today, a matter of policy on which the court has no voice.”

¹⁵¹³ There are a series of statutes which directly or indirectly provide (un)employment protection to certain classes and categories of persons. These statutes include, among others, the *Maternity Benefits Act* (1961) (maternity benefits for women workers in the event of child birth, miscarriage or abortion and pregnancy related sicknesses), *Industrial Disputes Act* (1947) (compensation for involuntary unemployment due to lay-off, retrenchment and closure), labour laws (protection against arbitrary loss of jobs), and Constitution of India (making provision for certain (un)employment protection rights such as the right to work etc.)

maternity, sickness, unemployment and survivors' benefits are lumped under a single scheme (i.e. the unemployment insurance scheme). India is yet to adopt a scheme of unemployment insurance benefits.¹⁵¹⁴ The rationale behind the absence of such a scheme is assumed to be the high unemployment and underemployment which make it difficult to introduce such a scheme.¹⁵¹⁵ However, India's lack of an unemployment insurance system is objectionable. This is primarily because the employer liability system places the unemployment compensation burden on employers. Under the unemployment insurance system, the financing of unemployment benefits is normally a duty shared by employers and the employees. At times the state covers any financial deficits that may accrue in any financial year to keep the unemployment insurance system running. Secondly, beneficiaries claim benefits from a(n) (social security) institution and not an employer. In addition, the unemployment insurance system is based on the insurance principle of the pooling of risks.¹⁵¹⁶ Therefore, the unemployment compensation burden on employers is minimised.

Placing much emphasis on employer liability to the neglect of unemployment insurance, as India is doing, does not provide a feasible answer to the long-term unemployment protection needs of a country.¹⁵¹⁷ As Saini argues: "No system of social security can ignore the issue of unemployment insurance. Merely putting the burden on the employer...does not provide any

¹⁵¹⁴ India denounced the *Unemployment Convention* 2 of 1919 on 16 April 1938. The reason behind this is that "the Government of India Act has substantially altered the relations between the Central Government and the provinces and, under its terms, the subject-matter of the Convention had passed exclusively to the provinces" (Widdows K "The denunciation of international labour conventions" (1984) 33 *International and Comparative Law Quarterly* 1052 at 1056).

¹⁵¹⁵ According to Saini (Saini DB "India" in Van Eeckhoutte W (ed) *Social Security Law* (Kluwer (2001)) 158): "It appears that provision for a general unemployment insurance scheme is a far cry in a country like India where the figure of unemployed persons runs into millions and the growth rate in employment is very low. The key problem is the availability of funds..."

¹⁵¹⁶ The insurance principle "requires that everyone who is involved in and covered by the scheme makes a contribution to a common fund. When and if a contributor meets prescribed conditions for benefit – for example, [loses his or her employment] and has paid sufficient contributions over a specific period – his or her needs (or at least part of them) are met from the insurance fund" (ILO *Social Security Principles* (ILO (1998)) 10).

¹⁵¹⁷ The undesirability of the employer liability model has been alluded to by the National Labour Commission (India) as follows: "The present arrangement by which the lay-off and retrenchment compensation is required to be borne by the employer at a time when he is really in difficulties...works somewhat harshly on him but more harshly on workers who are on many occasions deprived of the benefits provided under the Act...The long term solution lies in adopting a scheme of unemployment insurance for all employed persons. The present scheme of benefit against retrenchment and lay-off must continue during the transition" (National Commission on Labour (India) quoted by Saini DB "India" in Van Eeckhoutte W (ed) *Social Security Law* (Kluwer (2001)) 157).

realistic solution.”¹⁵¹⁸ It could, therefore, be argued that India should introduce an unemployment insurance scheme. Such a scheme need not cover the entire workforce at its inception. For instance, it could limit its scope of coverage to a certain section of the labour force and progressively expand to include the excluded groups and categories of persons. In spite of the foregoing assertions, several unemployment benefits are separately identifiable under the Indian unemployment protection system, i.e.: unemployment benefits, sickness benefits, maternity benefits and dependants benefits.¹⁵¹⁹

3.2.1. Unemployment benefits

India, just like many developing countries, “find[s] it difficult to provide unemployment benefit of any substantial magnitude.”¹⁵²⁰ As Saini observes: “virtually no unemployment benefit worth the name is provided by the state [in India] directly or through social security institutions.”¹⁵²¹ Consequently, India relies on employer liability schemes to provide compensation for lay-offs, retrenchments and closures of undertakings.¹⁵²² The disadvantage of the employer liability scheme in India is that it covers a fraction of the population, as few people are involved in the formal labour market. In addition, it is doubtful whether employer liability schemes deserve being referred to as ‘unemployment benefits scheme’ because “[t]he linkage of these gratuities to length of service makes them more akin to a retirement provision for long-service employees than an unemployment benefit scheme.”¹⁵²³

¹⁵¹⁸ Saini DB “India” in Van Eeckhoutte W (ed) *Social Security Law* (Kluwer (2001)) 157.

¹⁵¹⁹ India has ratified the *Equality of Treatment (Social Security) Convention* (1962) in 1964. It accepted the obligations flowing from this Convention relating to medical care, sickness benefit and maternity (see Committee of Experts on the Application on Conventions and Recommendations *Equality of Treatment (Social Security) Convention, 1962 (No. 118): India* Observation, Committee of Experts on the Application on Conventions and Recommendations (CEACR) 2001/72nd Session). Nevertheless, it is (as on 23 May 2006) yet to ratify the *Social Security (Minimum Standards) Convention* 102 of 1952; the *Medical Care and Sickness Benefits Convention* 130 of 1969 and Recommendation 134 of 1969; the *Employment Promotion and Protection against Unemployment Convention* 168 of 1988 and Recommendation 176 of 1988; and the *Maternity Protection Convention* 183 of 2000 and Recommendation 191 of 2000. The non-ratification of these instruments is disappointing – particularly when one considers their status as the up-to-date instruments.

¹⁵²⁰ Saini DB “India” in Van Eeckhoutte W (ed) *Social Security Law* (Kluwer (2001)) 144.

¹⁵²¹ *Ibid.*

¹⁵²² This kind of ‘unemployment benefit scheme’ can also be found in other Asian countries such as Bangladesh and Pakistan.

¹⁵²³ ILO *World Labour Report 2000: Income Security and Social Protection in a Changing World* (ILO (2000)) 161.

3.2.2. Sickness benefits

The *Employee State Insurance Act* (ESIA)¹⁵²⁴ makes provision for the payment of sickness benefits. Sickness benefits, therefore, endeavour to partially restore lost earnings of an insured person due to an illness. The ESIA applies to all factories, including factories belonging to the Government, other than seasonal factories.¹⁵²⁵ However, it does not apply to a factory or establishment belonging to or under the control of the Government whose employees are otherwise in receipt of benefits substantially similar to or superior to the benefits provided under the ESIA.¹⁵²⁶ Sickness benefits are financed by means of contributions from both employees and their employers.¹⁵²⁷ These contributions are paid into a fund called Employees' State Insurance Fund established by the ESIA.¹⁵²⁸ Sickness benefits are payable in the event of an insured person falling ill. In accordance with Rule 55(1) *Employees' State Insurance (Central) Rules* (1950) "a person shall be qualified to claim sickness benefits for sickness occurring during any benefit period if the contribution[s] in respect of him were payable for not less than seventy-eight days in the corresponding contribution period..."¹⁵²⁹ This has a negative impact on casual workers: "In India, a large number of workers fall in this category. Even as they pay their contribution to the ESI scheme, they are not able to avail of the sickness and maternity benefits due to the qualifying conditions on the one hand and the non-availability the work to them on a regular basis on the other. Since this category of workers mostly works on intermittent intervals, they often fail to qualify due to technical rules of eligibility for not having worked for the requisite number of days in the corresponding period."¹⁵³⁰

¹⁵²⁴ Act 34 of 1948.

¹⁵²⁵ S 1(4) of the *Employee State Insurance Act* 34 of 1948 (hereinafter ESIA).

¹⁵²⁶ *Ibid.*

¹⁵²⁷ S 39 of the ESIA.

¹⁵²⁸ S 26 of the ESIA.

¹⁵²⁹ Rule 55(1) *Employees' State Insurance (Central) Rules* (1950) is subject to the condition that the prospective beneficiaries "shall not be entitled to the benefits for the first two days of sickness in the case of a spell of sickness following at an interval of not more than fifteen days, the spell of sickness for which sickness benefits were last paid." In addition, sickness benefits are not payable for more than ninety-one days in any two consecutive benefit periods (rule 55(1) *Employees' State Insurance (Central) Rules* (1950)).

¹⁵³⁰ Saini DB "India" in Van Eeckhoutte W (ed) *Social Security Law* (Kluwer (2001)) 79.

To protect sickness benefits against abuse the ESIA makes provision for the punishment (imprisonment, or fine and/or both) of a person who knowingly makes or causes to be made any false statement or false representation for the purpose of drawing benefits such person is not entitled to.¹⁵³¹ In addition to the foregoing, the ESIA directs that: sickness benefits are not assignable or attachable;¹⁵³² a person entitled to sickness benefits is not entitled to receive any similar benefit admissible in terms of any other laws;¹⁵³³ a person in receipt of sickness benefits shall remain under medical treatment at a dispensary, hospital, clinic or other medical officer or medical attendant in charge thereof; shall not while under treatment do anything which might retard or prejudice his chances of recovery; shall not leave the area in which medical treatment is provided without the permission of the medical officer or medical attendant; and shall allow himself to be examined by a duly appointed medical officer;¹⁵³⁴ sickness benefits may not be combined with other benefits (such as maternity benefit and disablement benefit);¹⁵³⁵ and a person who received sickness benefits improperly shall be liable to repay the value of the benefit or the amount of such payment.¹⁵³⁶

3.2.3. Maternity benefit

Three major maternity benefit schemes are identifiable in India. Two of these three, established by the *Maternity Benefit Act* (1961) (hereinafter the MBA)¹⁵³⁷ and the ESIA¹⁵³⁸

¹⁵³¹ S 84 of the ESIA.

¹⁵³² S 60 of the ESIA.

¹⁵³³ S 61 of the ESIA.

¹⁵³⁴ S 64 of the ESIA.

¹⁵³⁵ S 65(1) of the ESIA. According to s 65(2), in an event of an insured person being entitled to more than one benefit, such person shall be entitled to choose which benefit he/she shall receive.

¹⁵³⁶ S 70 of the ESIA.

¹⁵³⁷ In accordance with the MBA every female employee has a right to maternity benefit whereas employers have a duty to pay maternity benefits to their female employees (s 5 of the MBA). The maternity benefit is paid at the rate of the average daily wage for the period of that female employee's actual absence from work (*ibid*). This is the period immediately preceding the day of her delivery, the actual day of her delivery and any period immediately following that day (*ibid*). To qualify for maternity benefits, the woman in question must have worked in an establishment of the employer from whom she is claiming benefits for a period not less than eighty days in the twelve months immediately preceding the date of her expected delivery (s 5(2) of the MBA). In accordance with the MBA, when calculating the eighty days period, the days for which the woman concerned has been laid off or was on holidays declared under any law during the period of twelve months immediately preceding the date of her expected delivery should be taken into account (*ibid*). Maternity benefits are payable for a maximum period of twelve weeks of which not more than six weeks shall precede the date of her expected delivery (s 5(3) of the MBA).

respectively, operate on a social insurance basis while the third one is a social assistance scheme (National Maternity Benefit Scheme). The difference between the MBA scheme and ESIA scheme is that under the ESIA “contributions have to be paid by the employees at common rate” whereas the MBA “envisages the employer’s unilateral liability for women workers for their maternity.”¹⁵³⁹ Furthermore, the MBA applies to every establishment wherein ten or more persons are employed¹⁵⁴⁰ and its scope of coverage is not subject to a wage ceiling. In addition, it does not apply to employees covered by the ESIA.¹⁵⁴¹ On the other hand, the ESIA’s covers employees earning not more than Rs. 7,500 per month.¹⁵⁴² The National Maternity Benefits Scheme (NMBS), unlike the MBA and ESIA maternity schemes, is a social assistance scheme introduced by Central Government. The NMBS, which falls under the Indian National Social Assistance Programme (NSAP), provides means-tested cash maternity benefits to women below the poverty line. These benefits are available to all women living below the poverty line irrespective of whether they are employed, self-employed or unemployed. Alongside the NMBS there are Labour Welfare Funds, also administered by Central Government, which make provision for maternity assistance to women in certain establishments.¹⁵⁴³ Maternity benefits payable under the NMBS and the Beedi Worker’s Welfare Fund are limited to the first two live births per woman.

¹⁵³⁸ The ESIA makes provision for the payment of maternity benefits (s 50 of the ESIA). Maternity benefits, similarly to sickness benefits, are financed by means of contributions from both employees and their employers (s 39 of the ESIA). An insured woman is entitled to draw maternity benefits if the contributions in respect of her were payable for not less than seventy days in the immediately preceding two consecutive contribution periods Rule 55(1) *Employees’ State Insurance (Central) Rules* (1950). A woman who qualifies for maternity benefits shall be entitled to receive the daily rate of maternity benefits (see the table Standard Benefit Rate) for all days on which she does not work for remuneration during the twelve weeks of which not more than six weeks shall precede the expected date of confinement (rule 56(2) *Employees’ State Insurance (Central) Rules*). Maternity benefits provided under the ESIA are, just like sickness benefits, protected from abuse. The ESIA makes provision for the punishment (imprisonment, or fine and/or both) of a person who knowingly makes or causes to be made any false statement or false representation for the purpose of drawing benefits such person is not entitled to (s 84 of the ESIA). As in the case of sickness benefits, the ESIA provides that: maternity benefits are not assignable or attachable (s 60 of the ESIA); a person entitled to maternity benefits is not entitled to receive any similar benefit admissible in terms of any other law (s 61 of the ESIA); maternity benefits may not be combined with other benefits (s 65(1) of the ESIA); and a person who received maternity benefits improperly shall be liable to repay the value of the benefit or the amount of such payment (s 70 of the ESIA).

¹⁵³⁹ Saini DB “India” in Van Eeckhoutte W (ed) *Social Security Law* (Kluwer (2001)) 101.

¹⁵⁴⁰ S 2(1)(a)-(b) of the MBA.

¹⁵⁴¹ S 2(2) of the MBA.

¹⁵⁴² The wage ceiling has been enhanced from Rs. 6,500 to Rs. 7,500 per month with effect from 1 April 2005 (Employee’s State Insurance Corporation (India) – accessible at <http://esic.nic.in>).

¹⁵⁴³ The Beedi Workers’ Welfare Fund, for example, provides maternity assistance in cash to women *beedi* workers.

3.2.4. Dependants' benefits

Dependants' benefits in India have, in most instances, the same characteristics as those found in South Africa and Germany.¹⁵⁴⁴ They are, for example, found in a number of different social security statutes. The *Workmen's Compensation Act* (1923) (hereinafter the WCA) and ESIA are, among others, some of the most notable pieces of legislation making provision for the payment of survivors' benefits.¹⁵⁴⁵ It should be noted that the WCA does not apply in a situation where the ESIA makes provision for similar benefits.¹⁵⁴⁶ Dependants' benefits payable under the WCA and the ESIA are subject to qualifying conditions. Firstly, the deceased person must have been an employee.¹⁵⁴⁷ This condition normally requires the existence of a contract of employment. To prove the existence of such a contract the court relies on a variety of tests which include the 'supervision or control test'.¹⁵⁴⁸ Secondly, the deceased employee must have met his or her death during the cause and scope of his or her employment.¹⁵⁴⁹ This results in the exclusion and marginalisation of independent contractors and other groups and categories of persons, particularly those involved in the informal economy.¹⁵⁵⁰

Three groups of dependants¹⁵⁵¹ are identifiable:

¹⁵⁴⁴ See, for a detailed account of the South African death and survivors' benefits, Olivier MP "Death and survivor's benefits" in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 301.

¹⁵⁴⁵ In addition to these schemes there are, of course, pension and provident funds which also provide benefits.

¹⁵⁴⁶ This effectively means that employees who fall within the scope of coverage of the ESIA are not entitled to benefits under the WCA. See, for example, *ESI Corporation v Chanambikai Mills* (1974) Labour and Industrial Cases 798 (Mad) and *ESI Corporation v Oswal Wollen Mills Ltd* (1980) Labour and Industrial Cases 1064 (Punj.).

¹⁵⁴⁷ See s 2(9) of the ESIA and s 2(1)(n) of the WCA. It should be noted, nonetheless, that the term 'employee' has a wider coverage in the ESIA than the WCA.

¹⁵⁴⁸ See *Dhrangadhra Chemical Works Ltd v State of Saurashtra* AIR 1957 SC 264. Also see Jain S "Contract of service and contract for service" (2003) 8 *Supreme Court Cases (Journal)* 2 – <http://www.ebc-india.com/lawyer/articles/2003v8a2.htm>.

¹⁵⁴⁹ See, for example s 52 of the ESIA and Rule 58 of the *Employees' State Insurance (Central) Rules*.

¹⁵⁵⁰ See, for example, Saini DB "India" in Van Eeckhoutte W (ed) *Social Security Law* (Kluwer (2001)) 135-136.

¹⁵⁵¹ The definition of 'dependant' as expounded in the ESIA is identical to that found in the WCA.

- First group – a widow, a minor legitimate or adopted son; an unmarried legitimate or adopted daughter and a widowed mother. Actual dependency on the earnings of the deceased person is not necessary.¹⁵⁵²
- Second group – a legitimate or adopted son or daughter who has attained the age of eighteen years and is infirm can claim benefits if they were wholly dependent on the earnings of the insured person at the time of his/her death.¹⁵⁵³
- Third group – a parent other than a widowed mother; a minor illegitimate son, an unmarried illegitimate daughter or a daughter legitimate or adopted or illegitimate if married (and so forth); minor brother or an unmarried sister or a widowed sister if a minor; a widowed daughter-in-law; a minor child of a pre-deceased son; a minor child of a pre-deceased daughter where no parent of the child is alive; or a paternal grand-parent if no parent of the insured person is alive. This category can only claim benefits if they were wholly or in part dependent on the earnings of the insured person at the time of his/her death.¹⁵⁵⁴

The first and the second group of dependants are ranked above the third category when it comes to the payment of benefits. The third group of dependants stand to benefit only when the deceased died without leaving the first and second group of dependants.¹⁵⁵⁵

3.2.5. Other unemployment protection measures

Widespread poverty, which is exacerbated by unemployment and under-employment, requires some form of intervention from the state. The nature and scope of interventions often offered by states to alleviate deprivation vary from country to country. Developed countries, as it follows naturally, have more elaborate measures when compared to developing countries. These measures, which are often in cash or kind, are funded from the general government

¹⁵⁵² S 2 of the ESIA.

¹⁵⁵³ *Ibid.*

¹⁵⁵⁴ *Ibid.*

¹⁵⁵⁵ See Rule 58 of the *Employees' State Insurance (Central) Rules*.

revenues. In India these measures include, among others, social assistance benefits and income generating schemes such as the Employment Intensive Programmes (EIPs).¹⁵⁵⁶ Social assistance benefits in India are largely organised under the National Social Assistance Programme (NSAP) which came into operation in 1995. Benefits rendered under the NSAP are funded by the central government of India. The NSAP comprise of the following schemes:

- National Old Age Pension Scheme – it provides a monthly grant to senior citizens who are 65 years or older and live below the poverty line.
- National Family Benefit Scheme – it provides a grant to the bereaved household in the event of the death of the primary breadwinner.
- National Maternity Benefit Scheme – it provides means-tested cash maternity benefits to women below the poverty line. As pointed out above, these benefits are available to all women living below the poverty line irrespective of whether they are employed, self-employed or unemployed.

Two points of criticism can be levelled against the Indian social assistance benefits. Firstly, the value of the benefits is too low.¹⁵⁵⁷ Secondly, it has been reported that the level of awareness about the state's social assistance scheme for the old is low.¹⁵⁵⁸ The lack of awareness among the intended beneficiaries is counter-productive for the reason that it results in a low take-up rate. Low take-up rate on the other hand undermines the poverty

¹⁵⁵⁶ It should be recalled that India has ratified the *Employment Policy Convention* (1964). Article 1(1) of this Convention requires India to: "With a view to stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment...declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment." In addition, it has ratified the *Employment Service Convention* (1948). This instrument requires the ratifying States to maintain or ensure the maintenance of a free public employment service (article 1(1) of the *Employment Service Convention*). The essential duty of the employment service, according to article 1(2) of this Convention, is to ensure, in co-operation where necessary with other public and private bodies concerned, the best possible organisation of the employment market as an integral part of the national programme for the achievement and maintenance of full employment and the development and use of productive resources.

¹⁵⁵⁷ Jain S "Basic social security in India" in Van Ginneken W *Social Security for the Excluded majority: Case Studies of Developing Countries* (ILO (1999)) 37 at 51.

¹⁵⁵⁸ See, for example, Sankaran TS "Social assistance: Evidence and policy issues" in Van Ginneken W (ed) *Social Security for All Indians* (Oxford University Press (1998)) 57.

alleviation effect of social assistance benefits. It nevertheless follows that social assistance benefits play an important role in easing the impact of unemployment (and underemployment) which usually presents itself in the form of poverty. No matter how modest social assistance benefits are, it is true that they do have a positive impact on alleviating poverty among the poorest of the poor.¹⁵⁵⁹

Apart from social assistance benefits, India has a long history of public works programmes which can be traced from pre-independence through to post-independence.¹⁵⁶⁰ Some of the notable post-independence public works programmes include: the Rural Works Programme, the Pilot Rural Employment Project, the Food for Work Programme, the National Rural Employment Programme and the Rural Landless Employment Guarantee Programme. The Jawahar Rozgar Yojana (JRY) introduced in 1989 replaced the National Rural Employment Project and the Rural Landless Employment Guarantee Programme.¹⁵⁶¹ The objective of JRY is fixed on addressing unemployment and underemployment. As Saini points out:

“The primary objective of JRY is generating additional gainful employment for the unemployed and the underemployed in the rural areas. Its secondary objective is the creation of sustained employment by strengthening the rural economic infrastructure and providing community and social assets to

¹⁵⁵⁹ See, for example, Case A *Does Money Protect Health Status? Evidence from South African Pensions* (NBER Working Paper Series (2001)), Bertranou F and Grushka CO *The Non-Contributory Pension in Argentina: Assessing the Impact on Poverty Reduction* (ILO Extension of Social Security Paper No. 5 (2002)), Bhorat H “Is a universal grant the answer?” (2002) 26 *SA Labour Bulletin* 19 at 20-21, Bhorat H “A universal income grant scheme for South Africa: An empirical assessment” – accessed at <http://www.sarpn.org.za>, Durán-Valverde F *Anti-poverty Programme in Costa Rica: The Non-Contributory Pension Scheme* (ILO Extension of Social Security Paper No. 8 (2002)), Lloyd-Sherlock P “Old age and poverty in developing countries: New policy challenges” (2002) 28 *World Development* 2157 at 2162 -2163, Barrientos A and Lloyd-Sherlock P “Non-contributory pensions and social protection” (NCPPS (2002)) – accessed at <http://idpm.man.ac.uk/ncpps>, Graham-Brown S “Social protection in South Africa” (2002) *NCPS Newsletter* 3 – accessed at <http://idpm.man.ac.uk/ncpps>, Samson M *et al Research Review on Social Security Reform and the Basic Income Grant for South Africa* (ILO and EPRI (2002)), Schleberger E *Namibia’s Universal Pension Scheme: Trends and challenges* (ILO Extension of Social Security Paper No. 6 (2002)), Schwarzer H and Querino AC *Non-Contributory Pensions in Brazil: The Impact on Poverty Reduction* (ILO Extension of Social Security Paper No. 11 (2002)), Duflo E *Grandmothers and Granddaughters: Old Age Pensions and Intra-Household Allocation in South Africa* (NBER Working Paper Series (2000)), Alderman H *Safety Nets and Income Transfers in South Africa* (World Bank (1999)) and Lund F and Patel Z “Socio-economic context of health” (1995) *South African Health Review* – accessed at <http://www.hst.org.za/sahr/chap2.htm>.

¹⁵⁶⁰ See Hirway I and Terhal P *Towards Employment Guarantee in India: Indian and International Experiences in Rural Public Works Programmes* (Sage (1994)).

¹⁵⁶¹ See Saini DB “India” in Van Eeckhoutte W (ed) *Social Security Law* (Kluwer (2001)) 196-200.

benefit the rural poor for overall improvement in the quality of life in rural areas and producing positive impact on wage levels.”¹⁵⁶²

Alongside the JRY there are employment guarantee schemes which operate at state level. One such scheme, which deserves special mention, is the Maharashtra Employment Guarantee Scheme (MEGS). The MEGS is a state-wide programme in Maharashtra. This programme is based on the explicit recognition, expressed in a Statutory Act enacted in 1978 by the State Assembly, of the right-to-work for every adult aged 18 and above in the rural areas of the state.¹⁵⁶³ The salient features of the MEGS include the following: it guarantees productive employment (when needed) to every adult in rural Maharashtra;¹⁵⁶⁴ projects are selected and designed to improve the productivity of agricultural and other rural resources such as, *inter alia*, irrigation works and road building; wages are fixed on the basis of the quality and quantity of work; welfare amenities, such as drinking water, crèches, rest shade and first aid facilities, are provided to workers; and it is funded from taxes.¹⁵⁶⁵ In addition to the foregoing schemes, there is another employment guarantee scheme, called the Employment Assurance Scheme (EAS), whose primary objective is the creation of additional wage-employment during the period of acute shortage of wage employment.¹⁵⁶⁶ That is normally during the lean agriculture season.¹⁵⁶⁷ In addition the EAS is aimed at creating economic infrastructure and community assets for sustained employment and development.¹⁵⁶⁸ The EAS is open to all indigent rural people living below the bread line. Participation is limited to a maximum of two adults per family.

The employment guarantee schemes (such as the MEGS) are different from other public works programmes in the sense that they give people work entitlement as a matter of right. The advantage of an employment guarantee scheme protected by law (i.e. with a legally

¹⁵⁶² *Ibid* at 199.

¹⁵⁶³ Hirway I and Terhal P *Towards Employment Guarantee in India: Indian and International Experiences in Rural Public Works Programmes* (Sage (1994)) 104.

¹⁵⁶⁴ It should be borne in mind, however, that there is no freedom of choice by workers as to which kind of work should be assigned to them.

¹⁵⁶⁵ Hirway I and Terhal P *Towards Employment Guarantee in India: Indian and International Experiences in Rural Public Works Programmes* (Sage (1994)) 105-106.

¹⁵⁶⁶ See, generally, Williams G *et al* “Participation and power: Poor people’s engagement with India’s Employment Assurance Scheme” (2003) 34 *Development and Change* 163.

¹⁵⁶⁷ Saini DB “India” in Van Eeckhoutte W (ed) *Social Security Law* (Kluwer (2001)) 199.

¹⁵⁶⁸ *Ibid*.

binding guarantee of work) is that such as scheme “is likely to be more durable than an ad hoc scheme, and less vulnerable to being phased out in the event of fiscal crisis.”¹⁵⁶⁹ For example, the MEGS has been in existence for nearly 30 years without change. Another issue which should be noted is that “[o]ne of the most important effects of the [employment guarantee schemes] is seasonal stabilization of the incomes of the poor.”¹⁵⁷⁰ Employment guarantee schemes are conspicuous by their absence in South Africa. It is therefore suggested that South Africa should investigate the possibility of introducing employment guarantee schemes.

In the light of the preceding outline of social assistance programmes and employment guarantee schemes found in India, the point to be observed is that employment guarantee schemes (alongside social assistance programmes) have an important social security function – particularly within the framework of an unemployment protection system. This is primarily because they target the working poor in the sense that the low wages or minimum wages they pay attract low skilled workers from low-income families.¹⁵⁷¹ By so doing they reduce the intensity of poverty.¹⁵⁷² This assertion should, however, be approached with scepticism because sometimes employment guarantee schemes have a potential of marginalising women. Physically demanding employment guarantee programmes and family responsibility unfriendly working times have a strong propensity of repelling rather than attracting women.¹⁵⁷³ Notwithstanding the foregoing, it should be borne in mind that social assistance

¹⁵⁶⁹ Dhavse R “India together: Entitling 40 million rural workers – September 2004” – accessed at <http://www.indiatogether.org>.

¹⁵⁷⁰ Dev SM “India’s (Maharashtra) Employee Guarantee Scheme” in Von Braun J (ed) *Employment for Poverty Reduction and Food Security* (International Food Policy Research Institute (1995)) 108-136.

¹⁵⁷¹ ILO *World Labour Report 2000: Income Security and Social Protection in a Changing World* (ILO (2000)) 164.

¹⁵⁷² As Hirway and Terhal (Hirway I and Terhal P *Towards Employment Guarantee in India: Indian and International Experiences in Rural Public Works Programmes* (Sage (1994)) 26) put it: “For poverty alleviation, the employment guarantee makes a considerable difference. First, the guarantee of work provides income security and therefore a minimum social safety net for the poor. Second, the guarantee element strengthens the position of the poor in their dealings with the public authorities. The poor are able to demand work as a right rather than be forced to wait for the administration to act. The guarantee also implies the government’s commitment to the poor and hence a political recognition of the poor. Finally, the right also improves the bargaining strength of the poor in relation to other employers in the economy.” Also see Nayyar R *The Contribution of Public Works and Other Labour-Based Infrastructure to Poverty Alleviation: The Indian Experience* (ILO Issues in Employment and Poverty Discussion Paper No. 3 (2002)).

¹⁵⁷³ See, for example, Hirway I and Terhal P *Towards Employment Guarantee in India: Indian and International Experiences in Rural Public Works Programmes* (Sage (1994)) 102.

programmes together with employment guarantee schemes support each other. This assertion is premised on a view that employment guarantee schemes are a useful tool in securing gainful employment for those who are able to work whereas social assistance programmes are crucial for providing benefits to those individuals who are unable to provide for themselves and those dependent on them due to, *inter alia*, poor health, age or disability.¹⁵⁷⁴

South Africa could learn much from the Indian experience as regards public works programmes. For instance, the purpose of Indian public works programmes (such as the MEGS) is to “generate longer-term *supplementary income* for vulnerable people whose other incomes are very low or volatile, often by offering them work opportunities in periods of cyclical unemployment, e.g. during the slack agricultural season. The purpose of programmes in these cases is to relieve income poverty and to smooth intra-seasonal consumption, by providing insurance against the effects of job insecurity and temporary livelihood impairment” (italics in the original).¹⁵⁷⁵ The South African public works programmes, in contrast to that of India, have “no catastrophe insurance objective, instead, [they] are intended to reduce unemployment and raise incomes, both by creating jobs immediately and by making the chronically unemployed more employable through work experience and training.”¹⁵⁷⁶

3.3. Employment protection

Similar to South Africa and Germany, India has enacted laws making provision for employment protection. This is the case despite India’s non ratification (as on 22 May 2006) of the *Termination of Employment Convention* (1982) as well as other employment protection-related ILO instruments such as the *Freedom of Association and Protection of the Right to Organise Convention* (1948) and the *Right to Organise and Collective Bargaining Convention* (1949). Provisions relating to employment protection are mainly contained in the

¹⁵⁷⁴ *Ibid* 36.

¹⁵⁷⁵ Overseas Development Institute (ODI) “Public works as a solution to unemployment in South Africa? Two different models of public works programme compared” (2004) 2 (*ODI Economic and Statistics Analysis Unit Briefing Paper* 5).

¹⁵⁷⁶ *Ibid*.

Constitution of India, the *Industrial Employment (Standing Orders) Act* (1946)¹⁵⁷⁷ (hereinafter the IESA) and the *Industrial Disputes Act* (1947) (hereinafter the IDA). The Constitution of India has enshrined rights and freedoms, such as the right to equality¹⁵⁷⁸ and freedom of profession, trade and business¹⁵⁷⁹, which are relevant in the employment protection sphere. In addition, the Constitution of India has special provisions dealing with the termination of employment of a civil servant.¹⁵⁸⁰ The employment protection provisions contained in Indian laws outline the administrative restrictions and procedures to curb dismissals as well as, in some instances, severance pay.

3.3.1 Administrative restrictions and procedures to curb dismissals

Indian law pertaining to the termination of employment does permit an employer to terminate an employee's contract of employment on the basis of misconduct,¹⁵⁸¹ incapacity¹⁵⁸² and

¹⁵⁷⁷ In accordance with the *Industrial Employment (Standing Orders) Act* (1946), employers in every industrial establishment wherein one hundred or more workmen are employed on any day of the preceding twelve months have an obligation to define (with sufficient precision) the conditions of employment under them and to make such conditions known to their employees (the preamble and s 1(3) of the *Industrial Employment (Standing Orders) Act* (1946)). The standing orders envisaged are required to make provision for matters such as, among others: termination of employment, and the notice thereof to be given by employer and workmen; suspension or dismissal for misconduct, and acts or omissions which constitute misconduct; and means of redress for workmen against unfair treatment or wrongful exactions by the employer or his agents or servants (schedule to the *Industrial Employment (Standing Orders) Act* (1946)). See, for a model standing order, the *Industrial Employment (Standing Orders) Central Rules* (1946).

¹⁵⁷⁸ The Constitution of India prohibits the state of India from denying any person within the territory of India equality before the law or equal protection of the law (article 14 of the Constitution of India). In addition, it prohibits discrimination on grounds of religion, race, caste, sex or place of birth (article 15 of the Constitution of India). Furthermore, the Constitution of India makes provision for equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state (article 16 of the Indian Constitution). The foregoing provision does not, however, preclude the state from introducing affirmative action measures (article 16(4)-(4A) of the Constitution of India). See, for further reading, Béteille A *Caste, Inequality and Affirmative Action* (ILO International Institute for Labour Studies (2002)) – accessed at <http://www.ilo.org/public/english/bureau/inst/download/andre.pdf>, Chatterji PC “Affirmative action programs (India): Cultural concerns” (2001) *International Encyclopedia of Social & Behavioral Sciences* 218, Singh A “Affirmative action programme: A comparative study of India and US” – accessed at <http://sos-net.eu.org/red&s/dhdi/recherches/etudesdiverses/memoires/amarthesis.pdf>, Hodges-Aeberhard J “Affirmative action in employment: Recent court approaches to a difficult concept” in Loufti MF (ed) *Women, Gender and Work: What is Equality and How Do We Get There?* (ILO (2001)) 441 at 458-459, Jackson DW “Affirmative action in comparative perspectives: India and the United States” in Loenen T and Rodrigues PR (eds) *Non-Discrimination Law: Comparative Perspectives* (Kluwer (1999)) 249.

¹⁵⁷⁹ Article 19(1)(f) of the Constitution of India.

¹⁵⁸⁰ Article 311 of the Constitution of India.

¹⁵⁸¹ An employee's conduct may in some instances justify his or her dismissal. Such conduct includes wilful insubordination or disobedience, theft or dishonesty, wilful damage or loss of employer's property, habitual

operational requirements of the employer.¹⁵⁸³ In addition, the IDA expressly prohibits employers from committing an unfair labour practice.¹⁵⁸⁴ In light of that, the dismissal of an employee in violation of fair labour practices¹⁵⁸⁵ as outlined in legislation and case law is invalid.¹⁵⁸⁶ It is unlawful for an employer to dismiss or discharge a woman employee who is absent from work on account of pregnancy or to give notice of discharge or dismissal or to vary to her disadvantage any of the conditions of her service.¹⁵⁸⁷ An employer may not dismiss an employee during the period such an employee is in receipt of sickness or maternity benefits. In addition an employer may not, except under regulations, dismiss an employee who is in receipt of disablement benefit for temporary disablement or is under

lateness or absence and participation in an illegal strike (International Labour Office *Termination of Employment Digest* (International Labour Office (2000)) 172).

¹⁵⁸² As regards incapacity, an employer may discharge an employee on medical grounds. In addition, an employer has the right to dismiss an employee “who fails to qualify for a post requiring certain skills when fair chances are given for passing the examination” (Johri CK “India” in Blanpain R (ed) *International Encyclopaedia for Labour Law and Industrial Relations* (Kluwer (2002)) 110).

¹⁵⁸³ According to s 2(oo) of the IDA the term ‘retrenchment’ refers to the termination by the employer of the service of a workman for any reason whatsoever, other than as a punishment inflicted by way of disciplinary action. Retrenchment does not, however, include: voluntary retirement of the workman; or retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation on that behalf contained therein; or termination of the service of a workman on the ground of continued ill-health (s 2(oo) of the IDA). The retrenchment of employees in India is regulated by the IDA and the *Industrial Disputes (Central) Rules*. Apart from the retrenchments, the IDA also makes provisions regarding the closure of undertakings (see s 25FFA of the IDA) as well as the transfer of undertakings (see s 25FF of the IDA).

¹⁵⁸⁴ S 25T of the *Industrial Disputes Act* (1947) (hereinafter the IDA). Schedule 5 of the IDA provides a list of situations which comprise an unfair labour practice. They include the following: to interfere with workmen in the exercise of their right to organise, form, join or assist a trade union or to engage in concerted activities for the purposes of collective bargaining (for instance, threatening a lock-out or closure, if a trade union is organised); to abolish the work of a regular nature being done by workmen, and to give such work to contractors as a measure of breaking a strike; to employ workmen as casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen and to refuse to bargain collectively, in good faith, with the recognised trade unions. Failure to adhere to the prohibition against committing an unfair labour practice is punishable by means of imprisonment for a term which may extend to six months or with a fine of up to one thousand rupees or both (s 25U of the IDA). Failure to comply with fair labour practices by individuals, unlike in India, is not punishable by imprisonment in South Africa.

¹⁵⁸⁵ For instance, dismissing an employee for trade union membership or on discriminatory grounds (such as race, religion, gender and so forth).

¹⁵⁸⁶ International Labour Office *Termination of Employment Digest* (International Labour Office (2000)) 172.

¹⁵⁸⁷ S 12 of the MBA. This provision is in accordance with the *Termination of Employment Convention* (1982) and the *Maternity Protection Convention* (2000). In accordance with article 5(e) of the *Termination of Employment Convention*, absence from work during maternity leave does not constitute valid reasons for the termination of employment. Furthermore, article 8(1) of the *Maternity Protection Convention* proscribes the termination of a contract of employment of a woman during her pregnancy or absence on maternity leave. In addition, it (at article 8(2)) provides a woman with the right to return to the same position or an equivalent position paid at the same rate at the end of her maternity leave.

medical treatment due to sickness or is absent from work as a result of a pregnancy-related illness.¹⁵⁸⁸ Any dismissal effected contrary to the foregoing prohibition is invalid or inoperative.¹⁵⁸⁹

Another important point to be noted is that employers are required to comply with the rules of natural justice prior to effecting a dismissal. For instance, an employer may not dismiss an employee on the ground of misconduct without holding a proper inquiry (often referred to as ‘domestic inquiry’) in which the employee’s misconduct has been established.¹⁵⁹⁰ Principles of natural justice should be observed during the domestic inquiry.¹⁵⁹¹ Therefore, it could be said that the domestic inquiry is calculated at affording an employee an opportunity to be informed of the charges against him or her and, most importantly, a chance to defend himself/herself against the charge(s). The rules of natural justice must not only be observed in the case of private sector employees, but also in dismissals involving civil servants. The Constitution of India prohibits the dismissal of a civil servant without an inquiry in which the civil servant concerned has been informed of the charge(s) against him or her and been given a reasonable opportunity to be heard.¹⁵⁹² It further directs that any penalty flowing from the enquiry shall be imposed on the basis of the evidence adduced during such enquiry.¹⁵⁹³ Also, the giving of evidence by the presiding officer during the disciplinary proceedings is contrary to the principles of natural justice.¹⁵⁹⁴ In addition, an inquiry officer is required to provide reasonable time for the charged officer to produce evidence and examine defence witnesses.¹⁵⁹⁵ The protection afforded by the Constitution of India, in as far as the dismissal of civil servants is concerned, is applicable to the “probationer who had been discharged from service on enquiry, as being unsuitable to the post on grounds of notoriety for

¹⁵⁸⁸ S 72(1) of the ESIA.

¹⁵⁸⁹ S 72(2) of the ESIA.

¹⁵⁹⁰ See Johri CK “India” in Blanpain R (ed) *International Encyclopaedia for Labour Law and Industrial Relations* (Kluwer (2002)) 99.

¹⁵⁹¹ *Ibid* 113-114.

¹⁵⁹² S 311(1) of the Constitution of India.

¹⁵⁹³ The prohibition against the dismissal of a civil servant without an enquiry does not apply in, among others, a situation where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge (s 311(2) of the Constitution of India).

¹⁵⁹⁴ *State of Uttar Pradesh v Mohammad Nooh* AIR 1958 SC 86.

¹⁵⁹⁵ *State of Uttar Pradesh v C.S. Sharma* AIR 1968 SC 158.

corruption and unsatisfactory work in the discharge of his public duties.”¹⁵⁹⁶ But, the termination of a fixed-term contract has been ruled as not attracting the protection provided by section 311 of the Constitution of India for the reason that there is neither a dismissal nor a removal service, nor is it a reduction in rank.¹⁵⁹⁷

3.3.1.1. Notice of termination

Employers are, in accordance with the IESA, required to provide notice of termination of employment to permanent employees. The notice period is one month. Payment *in lieu* of one month’s notice is also allowed. Failure to give notice or payment *in lieu* of such notice could affect the legality of the dismissal concerned.¹⁵⁹⁸ Nonetheless, employers are not required to give notice of termination in the case of employees who have been found guilty of grave misconduct as well as probationers and temporary workers.¹⁵⁹⁹ The preceding provisions regarding the notice of termination of a contract of employment are principally in line with those contained in the *Termination of Employment Convention*.¹⁶⁰⁰

3.3.1.2. Additional measures for collective dismissal

The IDA and the *Industrial Disputes (Central) Rules* set a series of conditions for employers to comply with in order to effect a legally valid retrenchment exercise. Prior to retrenching an employee who has been in continuous service for not less than one year, an employer is required to provide the employee affected with a one month written notice spelling out the reasons for retrenchment and the period of notice. In addition, an employer must give notice to the appropriate government authority.¹⁶⁰¹ The preceding conditions do not apply to industrial establishments in which less than fifty workmen on an average per working day

¹⁵⁹⁶ *State of Bihar v Gopi Kishore Prasad* AIR 1960 SC 689.

¹⁵⁹⁷ *Satish Chandra v Union of India* AIR 1953 SC 250.

¹⁵⁹⁸ International Labour Office *Termination of Employment Digest* (International Labour Office (2000)) 173.

¹⁵⁹⁹ *Ibid.*

¹⁶⁰⁰ According to article 11 of the *Termination of Employment Convention* “a worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.”

¹⁶⁰¹ S 25(c), R. 76 and R. 76A of the *Industrial Disputes (Central) Rules*.

have been employed in the preceding calendar month; or to industrial establishments which are of a seasonal character or in which work is performed only intermittently.¹⁶⁰² In the case of an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an, average per working day for the preceding twelve months the IDA, in addition to the abovementioned conditions, obliges employers concerned to apply for permission to retrench employees from the appropriate government or the specified authority.¹⁶⁰³ Employers regard the obligation to seek permission to retrenchment “as unreasonable restriction affecting the economic viability of an enterprise.”¹⁶⁰⁴ Despite that, it should be mentioned that the decision to retrench remains an employer prerogative. Furthermore, the right to retrench, according to *Workmen of Meenakshi Mills Ltd v Meenakshi Mills Ltd*,¹⁶⁰⁵ is an integral part of the constitutional ‘right to carry on business’.¹⁶⁰⁶ Notwithstanding that, the Court held that “the restrictions on [the right to retrench] were justified on the grounds that the restriction was essential to protect the ‘interests of workers’ and assured job security preserved ‘industrial peace and harmony’.”¹⁶⁰⁷ The primary aim of prior authorisation to retrench is to ensure that retrenchments are carried out for bona fide reasons and in accordance with fair labour practice.¹⁶⁰⁸ For this reason, the obligation to seek permission to retrench should deter employers without genuine reasons from effecting retrenchments.

3.3.2. Severance pay

An employer is required to pay an employee, at the time of retrenchment, compensation which is equivalent to fifteen days’ average pay for every completed year of continuous service or any part thereof in excess of six months.¹⁶⁰⁹ Provisions relating to severance pay

¹⁶⁰² S 25A of the IDA.

¹⁶⁰³ S 25K of the IDA.

¹⁶⁰⁴ Gupta AKS and Sett PK “Industrial relations law, employment security and collective bargaining in India: Myths, realities and hopes” (2000) 31 *Industrial Relations Journal* 144 at 146.

¹⁶⁰⁵ 1992 3 SCC 377.

¹⁶⁰⁶ Singh J “The law, labour and development in India” Paper presented at the Annual Bank Conference on development Economics – Europe, 24-26 June 2002, Oslo.

¹⁶⁰⁷ *Ibid* citing the *Workmen of Meenakshi Mills Ltd v Meenakshi Mills Ltd case*.

¹⁶⁰⁸ International Labour Office *Termination of Employment Digest* (International Labour Office (2000)) 173.

¹⁶⁰⁹ S 25F(b) of the IDA.

can also be found in the *Termination of Employment Convention*. Severance pay is crucial for retrenched Indian workers in light of the inadequate income protection provided by the social security system of that country.

3.4. Social security for the unorganised sector

3.4.1. Introduction

The concept ‘unorganised sector’ is, by far, yet to acquire a uniform definition.¹⁶¹⁰ This situation has prompted Rao to remark that:

“The so-called unorganised sector has not been defined anywhere scientifically. Nor was there any serious attempt to define this word or phrase. However, this term was used to speak of availability or non-availability of certain benefits or rights to the working class outside the organized sector. Sometimes this sector is also termed as informal sector.”¹⁶¹¹

In this study, the concept ‘unorganised sector’ is used interchangeably with ‘informal economy’.

¹⁶¹⁰ The first National Labour Commission (India), as cited by Rao (Rao PM “Social security for the unorganised sector in India –An approach paper” – accessed at <http://www.eldis.org/fulltext/raosocial.pdf>) defined the ‘unorganised sector’ as “the group of workers, who cannot be defined by definition but could be described as those who have not been able to organize in pursuit of a common objective because of constraints such as: casual nature of employment; ignorance and illiteracy; small size of establishments with low capital investment [...]; scattered nature of establishment; and superior strength of employer operating singly or in combination.” The Ministry of Labour India (Ministry of Labour India *The Ministry of Labour Annual Report 2001-2002* (Government of India) – accessed at <http://www.labour.nic.in/annrep/annrep2001-02.htm>), on the other hand, defined the concept ‘unorganised labour’ as “those workers who have not been able to organise themselves in pursuit of their common interests due to certain constraints like casual nature of employment, ignorance and illiteracy, small and scattered size of establishment, etc.” It goes further by distinguishing by demarcating unorganised labour into four categories, namely: “Occupation: Small and marginal farmers, landless agricultural labourers, share croppers, fishermen, those engaged in animal husbandry, in beedi rolling, labelling and packaging, building and construction, collection of raw hides and skins, handlooms weaving in rural areas, brick kilns and stone quarries, saw mills, oil mills etc.; Nature and employment: Attached agricultural labourers, bonded labourers, migrant workers, contract and casual labourers etc.; Specially distressed categories: Toddy tappers, scavengers, carriers of head loads, drivers of animal driven vehicles, loaders, unloaders etc.; and Service categories: Midwives, domestic workers, barbers, vegetable and fruit vendors, newspaper vendors etc. Ministry of Labour India *The Ministry of Labour Annual Report 2001-2002* (Government of India) – accessed at <http://www.labour.nic.in/annrep/annrep2001-02.htm>.

¹⁶¹¹ Rao PM “Social security for the unorganised sector in India – An approach paper” – accessed at <http://www.eldis.org/fulltext/raosocial.pdf>.

3.4.2. Salient features of the unorganised sector

As pointed earlier, India is not spared from one of the characteristics of developing countries, i.e. a rising informal economy. A major problem with the informal economy is that:

- It falls outside the scope of formal schemes which provide unemployment protection benefits and other benefits such as maternity and sickness benefits.¹⁶¹²
- It is often not covered by employment protection laws. The application of employment protection laws often requires an employer-employee relationship.¹⁶¹³ The effect of this lack of an employer-employee relationship is that “it makes it difficult to decide at whose door the burden of provision of...benefits should be placed.”¹⁶¹⁴
- It is precarious in the sense that it lacks, among others, income security, labour market security, employment security, and work security (for example, precarious working conditions are prevalent in the informal economy context).¹⁶¹⁵
- Mainstream trade unions are yet to make meaningful progress in organising the informal economy.¹⁶¹⁶

¹⁶¹² Social security benefits flowing from important statutes such as the MBA, WCA, ESIA are largely restricted to workers in the organised sector. See Iyer SV “Social security in India: Some issues and options” *Critical Reflections on State Human Development Reports* (GOA, 12-14 December 2003) – accessed at <http://goa.undp.org.in/resources/GOA%20DR.IYER2003.pdf> and Prabhu KS *Socio-Economic Security in the Context of Pervasive Poverty: A Case Study of India* (ILO (2001)) 22-23.

¹⁶¹³ See Rao PM “Social security for the unorganised sector in India – An approach paper” – accessed at <http://www.eldis.org/fulltext/raosocial.pdf>.

¹⁶¹⁴ Unni J and Rani U “Social protection for informal workers in India: Insecurities, Instruments and Institutional Mechanisms” (2003) 34 *Development and Change* 127 at 132.

¹⁶¹⁵ See Unni J and Rani U *Insecurities of Informal Workers in Gujarat, India* (ILO (2002)) 18-31.

¹⁶¹⁶ As Dasgupta (Dasgupta S *Organizing for Socio-Economic Security in India* (ILO (2002)) 2) points out: “Traditional trade unions in India have so far been less than effective in addressing the issues of informal workers. The main reason for this lies in the fact that traditional workers’ unions organize wage and salary workers, while the majority of those in the informal economy are so-called self-employed. [...] unions of the formally self-employed, on the other hand do not place the needs or realities of those in the informal economy on their agendas. Furthermore, the mobile, irregular and often illiterate characteristics of the informal workforce, a large proportion of which are women, make organizing such workers a real challenge. While the Trade Union Act in India is very liberal in its definition of a union (any seven workers can get together and form a union), the actual registration of a union lies with individual state Labour departments, which have raised the following issues with regard to unionisation in the informal sector: A large proportion of informal workers

- Social protection measures often fail to properly address social insecurities (which are illustrated by means of a diagram Social protection for the informal economy) informal economy workers are confronted with.¹⁶¹⁷ This failure stems from the fact that social protection approaches implemented are often inappropriate as well as ineffective for an environment in which poverty is rampant and the majority of the working population operate in the informal economy.¹⁶¹⁸
- Extensive illiteracy and ignorance often characterise those in the informal economy.¹⁶¹⁹

In the light of the abovementioned precarious position of the informal economy workers, there have been calls for a comprehensive social protection system for informal economy workers. The kind of social protection needed is one which is “designed not only to protect against contingencies, but also to promote income security through elimination of risks.”¹⁶²⁰

3.4.3. Informal safety nets

3.4.3.1. Introduction

Informal safety nets in India may – similarly to those found in South Africa – be divided into two categories, i.e. kinship and community-based informal safety nets and member organisation-based informal safety nets. These informal safety nets play an important role in minimising, though to a limited extent, social deprivation among the Indian poor. According

are self-employed, so there is an absence of [the] employer-employee relation. Hence there arises the question of whom to bargain with and within which framework. How can there be [a] union of so many different kinds of workers? How can workers who are so widely dispersed be organized.”

¹⁶¹⁷ See Rani U and Unni J “Social protection for informal workers in India: Insecurities, instruments and institutional mechanisms” (2003) 34 *Development and Change* 127 and Unni J and Rani U *Insecurities of Informal Workers in Gujarat, India* (ILO (2002)).

¹⁶¹⁸ Prabhu KS *Socio-Economic Security in the Context of Pervasive Poverty: A Case Study of India* (ILO (2001)), Unni J and Rani U “Social protection for informal workers in India: Insecurities, instruments and institutional mechanisms” (2003) 34 *Development and Change* 127 at 128 and Unni J and Rani U *Insecurities of Informal Workers in Gujarat, India* (ILO (2002)).

¹⁶¹⁹ Ministry of Labour India *The Ministry of Labour Annual Report 2001-2002* (Government of India) – accessed at <http://www.labour.nic.in/annrep/annrep2001-02.htm>.

¹⁶²⁰ Rani U and Unni J “Social protection for informal workers in India: Insecurities, instruments and institutional mechanisms” (2003) 34 *Development and Change* 127 at 130.

to Iyer informal social safety nets are the most prevalent forms of social protection in India.¹⁶²¹

3.4.3.2. Kinship and community-based informal safety nets

Blood relations and/or community membership has always bound individuals and communities in times of hardships (such as floods, poor harvest or loss of livestock). This has always been the case – particularly in rural communities of India.¹⁶²² Social hardships were averted or minimised among family or/and community members through the sharing of available resources. This form of a safety net, as it is the case in other developing countries, is gradually wearing away.¹⁶²³ Traditional families are not as closely knit as they used to be. For example:

“The traditional joint Hindu family system in India has been viewed as a source of considerable security to the old and the infirm. But this system is presently witnessing erosion due to rapid change in the social and economic profile of people. The traditional respect and the attitude of empathy and care for the old are being weakened...”¹⁶²⁴

The weakening of traditionally closely-knit family as a safety net (as well as other informal safety nets) has an adverse impact on the female population in that it renders them vulnerable to social and economic deprivation.¹⁶²⁵ This assertion should be understood against the backdrop that “traditional family-based social security has been the main source of social protection for the female population in most developing countries.”¹⁶²⁶

¹⁶²¹ Iyer SV “Social security in India: Some issues and options” *Critical Reflections on State Human Development Reports* (GOA, 12-14 December 2003) – accessed at <http://goa.undp.org.in/resources/GOA%20DR.IYER2003.pdf>.

¹⁶²² See, for example, Agarwal B “Social security and the family: Coping with seasonality and calamity in rural India” in Ahmad E et al (eds) *Social Security in Developing Countries* (Clarendon Press (1991)) 171.

¹⁶²³ See, for example, Van Ginneken W *Extending Social Security: Policies for Developing Countries* (ILO Extension of Social Security Paper No. 13 (2003)) 66.

¹⁶²⁴ Saini DB “India” in Van Eeckhoutte W (ed) *Social Security Law* (Kluwer (2001)) 193.

¹⁶²⁵ Iyer SV “Social security in India: Some issues and options” *Critical Reflections on State Human Development Reports* (GOA, 12-14 December 2003) – accessed at <http://goa.undp.org.in/resources/GOA%20DR.IYER2003.pdf>.

¹⁶²⁶ *Ibid.*

3.4.3.3. Member organisation-based informal safety nets

Among a number of member organisation-based informal safety nets operating in India (such as the Action for Community Organization, Rehabilitation and Development (ACCORD), Association for Sarva Seva Farms (ASSEFA), and the Society for Promotion of Area Resource Centres (SPARC)), the Self Employed Women's Association (SEWA) deserves special mention. The SEWA is an organisation for self-employed women which dates back to 1972. It is aimed at the realisation of full employment and self-reliance.¹⁶²⁷ SEWA's members comprise of those workers who have no fixed employee-employer relationship and rely on their labour to survive.¹⁶²⁸ The general characteristic of SEWA's members is that, apart from being women as well as self-employed, they are poor, illiterate and vulnerable.¹⁶²⁹ In addition, they can be divided into three categories, namely: hawkers, vendors and small business women; home-based workers; and manual labourers and service providers.¹⁶³⁰ This membership-based organisation provides services as diverse as banking, health care, child care and work security insurance. These services are among those services that vulnerable members of the society – who are marginalised by formal social security systems – are often in need of.

Notwithstanding the importance of other services, particularly in an unemployment protection system, it is worth noting how SEWA endeavours to provide employment security to its members through a work security scheme. Through its work security scheme, which is insurance based, SEWA provides cover to its members against those risks which often pose a serious threat to their lives and work such as illness, widowhood, accident, fire, communal riots, floods and other such natural and human-made calamities.¹⁶³¹ This is innovative and well-focused on the needs of the self-employed vulnerable women. The truth is that, in

¹⁶²⁷ See, for further reading, ILO *Women Organizing for Social Protection: The Self-Employed Women's Association's Integrated Insurance Scheme, India* (ILO (2001)), Jain S "Basic social security in India" in Van Ginneken W (ed) *Social Security for the Excluded Majority: Case Studies of Developing Countries* (ILO (1999)) 37 at 55-56, and Agarwal B "Social security and the family: Coping with seasonality and calamity in rural India" in Ahmad E *et al* (eds) *Social Security in Developing Countries* (Clarendon Press (1991)) 171 at 233.

¹⁶²⁸ Self Employed Women's Association – accessed at <http://www.sewa.org>.

¹⁶²⁹ *Ibid.*

¹⁶³⁰ *Ibid.*

¹⁶³¹ *Ibid.*

practice, tools used to ply respective trades as well as health or ability to perform tasks are the most important assets that the vulnerable need in order to cope with insecurity.

3.4.4. Extending social protection to the unorganised sector

There are several statutes which are applicable to the unorganised sector in India. These statutes include, among others, the *Payment of Wages Act* (1936); the *Employee's State Insurance Act* (1948); the *Plantation Labour Act* (1951); the *Maternity Benefit Act* (1961); the *Payment of Gratuity Act* (1972); and the *Personal Injuries (Compensation Insurance) Act* (1963). In addition, there are Bills on unorganised sector workers, namely: the *Unorganised Sector Worker's Social Security Bill* (2005) (focusing on social security issues) and the *Unorganised Sector Workers (Conditions of Work & Livelihood Promotion)* (2005) (focusing on conditions of unemployment). Furthermore, there are welfare funds which have been set up to cater for the social security needs of the various categories of the unorganised sector. Lastly, India has recently embarked on an experimental social security scheme geared towards the extension of social security to the unorganised sector.¹⁶³²

3.4.4.1. Welfare funds

Welfare funds are an innovative approach of extending social security to the unorganised sector which evolved in India. These funds are funded by means of cess (earmarked tax) levied “on the production, sale or export of specified goods, or by collecting contributions from various sources, including employers and the Government.”¹⁶³³ The welfare funds have been set up in areas such as mica mines;¹⁶³⁴ iron ore, manganese ore and chrome ore mines;¹⁶³⁵ beedi;¹⁶³⁶ limestone and dolomite mines;¹⁶³⁷ cine workers;¹⁶³⁸ and building and

¹⁶³² See The Unorganised Sector Workers' Social Security Scheme – <http://www.labour.nic.in/ss/socialsecurityunorganised.pdf>.

¹⁶³³ Unni J and Rani U *Social Protection for Informal Workers: Insecurities, Instruments and Institutional Mechanisms* (ILO (2002)) 24.

¹⁶³⁴ *Mica Mines Labour Fund Act* (1946).

¹⁶³⁵ *Iron Ore, Manganese Ore and Chrome Ore Mines Labour Welfare Cess Act* (1976).

¹⁶³⁶ *Welfare Workers Welfare Cess Act* (1976).

¹⁶³⁷ *Limestone and Mines Labour Welfare Fund Act* (1972).

¹⁶³⁸ *Cine Workers Welfare Cess Act* (1981).

construction.¹⁶³⁹ The welfare funds model, to some extent, bypasses the difficulties associated with the extension of ‘contribution-oriented’ or ‘employer-liability-oriented’ social security scheme’s scope of coverage to the unorganised sector. This is mainly because “the scheme of welfare funds is outside the framework of the specific employer and employee relationship in as much as the resources are raised by the Government on a non-contributory basis.”¹⁶⁴⁰ Most importantly, the “delivery of welfare services is effected without any linkage to contribution made in respect of the individual worker.”¹⁶⁴¹ Benefits provided through welfare funds include, among others, health and medical benefits, financial assistance for housing (in the form of subsidies and low interest loans), supply of drinking water, and education.¹⁶⁴² Nevertheless, several points of criticism have been levelled against the welfare funds. Unni and Rani, for example, criticised the welfare funds on the basis that: they tend to be bureaucratic and lacking in initiative; their administrative cost has been high; their lack of a registration system renders the identification of beneficiaries problematic and the widespread non-implementation of the requirement that employers issue identity cards results in the exclusion of large pockets of employees from benefits they are entitled to.¹⁶⁴³ To remedy the problem of high overheads, it has been suggested that some of the welfare funds be integrated.

3.4.4.2. Recent developments

India’s innovative advance in its quest to extend social security to the unorganised sector does not stop with the welfare funds model. For example, it launched in January 2004 a national social security scheme aimed at the unorganised sector dubbed the Unorganised Sector Workers’ Social Security Scheme (USWSSS). The USWSSS, which is implemented on a pilot basis in fifty districts over a five-year period, is aimed at providing the unorganised sector with pension, hospitalisation and disablement benefits.

¹⁶³⁹ *Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act* (1996) and the *Building and other Construction Workers Welfare Cess Act* (1966).

¹⁶⁴⁰ Saini DB “India” in Van Eeckhoutte W (ed) *Social Security Law* (Kluwer (2001)) 73.

¹⁶⁴¹ *Ibid.*

¹⁶⁴² Prabhu KS *Socio-Economic Security in the Context of Pervasive Poverty: A Case Study of India* (ILO (2001)) 52.

¹⁶⁴³ Rani U and Unni J “Social protection for informal workers in India: Insecurities, instruments and institutional mechanisms” (2003) 34 *Development and Change* 127 at 153.

Some of the salient features of this scheme are that:

- The *administration* of the USWSSS is assigned to the Employees Provident Fund Organization (EPFO). The EPFO is tasked with the allotment of a National Social Security Number to workers to be covered by the scheme.¹⁶⁴⁴
- *Participation* in the USWSSS is optional to all workers in the Age Group of 36-50 within five years from the date of commencement of the scheme. This is subject to the condition that they have an identifiable employer and they also pay contributions. Self-employed persons are free to join the scheme subject to the condition that they pay their contributions as well as those payable by the employer.¹⁶⁴⁵
- The USWSSS is financed through *contributions* from employees, their employers and the Central Government. Contributions are structured as follows: every worker (at a rate of Rs. 50 per month); and the employer (Rs. 50 for every worker per month). In a situation where an employer is not identifiable, workers contribute a minimum of Rs. 100 per month. Central Government is required to contribute 1.16 per cent of monthly wages of enrolled workers. Employers are required to collect contributions and deposit them together with their contributions at a designated branch of a bank or post office. Workers without an identifiable employer will similarly deposit their contributions at a designated branch of a bank or post office.¹⁶⁴⁶

¹⁶⁴⁴ The Unorganised Sector Workers' Social Security Scheme –
<http://www.labour.nic.in/ss/socialsecurityunorganised.pdf>.

¹⁶⁴⁵ *Ibid.*

¹⁶⁴⁶ *Ibid.*

4. SUMMARY

4.1. Germany

Germany has, generally speaking, a well developed (un)employment protection system. Its unemployment protection system makes provision for both social insurance and social assistance benefits. Its social insurance principle-based schemes, which (in)directly provide unemployment protection, include those that make provision for the following benefits: unemployment insurance benefits, sickness benefits, maternity benefits and survivors' benefits. Several matters regarding the German unemployment protection system, which could (in some instances) provide valuable lessons to the South Africa's endeavours to redesign its system, are notable:

- (a) Despite the basic theory underlying the social insurance principle, i.e. employees contribute toward a compulsory insurance scheme to insure themselves against a particular social risk, German employees with insignificant employment (up to €400 per month) or who earn above a set income ceiling are normally exempted from the scheme. Furthermore, voluntary insurance is, in certain instances, possible. For instance, the scope of coverage of the German unemployment insurance scheme includes employees employed for a minimum of 15 hours per week and earning more than €400 per month. In addition, there are categories of employees, which include civil servants (*Beamte*), who are excluded from the ambit of the unemployment insurance scheme. Yet, it should be stressed that the German civil servants – unlike those of South Africa – enjoy a higher level of employment protection. Concerning voluntary insurance, self-employed persons or persons caring for a relative at home have an opportunity to voluntarily contribute towards the unemployment insurance scheme in order to maintain or to reach their entitlements. This possibility, if it were to be introduced in South Africa, could be instrumental in ensuring that persons in that country who migrate from contributory employment to self-employment or unpaid care work do not lose their entitlement to benefits.

- (b) The German unemployment insurance system, as opposed to that of South Africa, covers both total and partial unemployment benefits. This, it is opined, is in accordance with international instruments in the unemployment protection sphere – particularly the *Employment Promotion and Protection against Unemployment Convention* (1988).
- (c) Albeit there are sickness cash benefits for temporary incapacity to work due to sickness, employees who have been employed for less than four weeks as well as those employees who become sick due to their own fault are not entitled to the aforesaid payment. As argued in this chapter, South Africa could draw valuable lessons from the German experience in as far as sickness benefits are concerned. Firstly, sickness benefits under the German regime are, unlike in the case of South Africa, catered for separately from the unemployment insurance scheme. The advantage of this approach is that the unemployment insurance scheme can focus on unemployment-specific issues such as preventing and combating unemployment. Additionally, South Africa could learn from the German approach and forbid entitlement to illness benefits by a contributor who is unemployed due to an illness arising from his or her own misconduct. After all, the exclusion of employees who are sick as a result of their own wrongdoing is in conformity with the principle that contributors who deliberately contribute towards their unemployment should not draw any benefits.
- (e) The German unemployment insurance system is, in principle, focused on providing the unemployment benefit. Unemployment-related benefits (such as sickness, maternity and survivors' benefits) are, unlike in South Africa, catered for by other separate schemes. South Africa, as mentioned earlier, needs to keep the pure unemployment benefit apart from other unemployment-related benefits mentioned earlier. Benefits, such as maternity and adoption benefits, belong to family protection schemes which have, it is argued, nothing to do with unemployment insurance.

- (f) Efforts to (re)integrate the unemployed into the labour market found in Germany are, to a large extent, closely linked with unemployment benefits. This, it is opined, highlights the close relationship between the unemployment benefits and (re)integration measures. Hence, an unemployment benefit is not an end in itself. An unemployment benefit stands right between preventive and (re)integrative measures. It should be remembered that the goal of an unemployment protection system is (or should be) the prevention of unemployment. And once unemployment is unavoidable, it should minimise the effect of unemployment through an unemployment benefit (in cash and/or kind). The provision of an unemployment benefit should – as an expression of the value of employment to individuals, families and the community at large – be supported by (re)integrative measures. It is submitted that South Africa could – in this regard – learn from the German experience. This line of reasoning is, as pointed out earlier, informed by the limited nature of the preventive and (re)integrative measures in the South African unemployment protection system.
- (g) Germany has concluded a variety of bilateral agreements dealing with unemployment insurance. In light of Germany's ratification of the *Unemployment Convention* (1919), it could be said that the aforesaid bilateral agreements are in accordance with *Unemployment Convention*. This Convention requires member states which have ratified it and which have established unemployment insurance systems to “make arrangements whereby workers belonging to one member and working in the territory of another shall be admitted to the same rates of benefit of such insurance as those which obtain for the workers belonging to the latter.”¹⁶⁴⁷. South Africa, which has ratified this Convention and has established an unemployment insurance system but is yet to enter into bilateral agreements dealing unemployment insurance, could learn from the German experience in this regard.

In the social assistance sphere, the German unemployment protection system makes provision for the unemployment benefit II and the social benefit. Both benefits are tax financed. The difference between the two benefits is that the unemployment benefit II is

¹⁶⁴⁷ Article 3 of the *Unemployment Convention* (1919).

aimed at providing a basic safety net for those needy and employable individuals between 15 and 65 years of age who are searching for work. The social benefit, on the other hand, is intended at providing a basic safety net for those individuals who are not fit to work. Several points regarding the German unemployment assistance scheme deserve special mention. Firstly, the unemployment benefit II beneficiaries are obliged to accept every lawful job offered to them irrespective of the pay provided. This approach, it is argued, puts more pressure on unemployed persons to take up available employment. In this way, an attempt is made to reintegrate the unemployment benefit recipients into the labour market. Notwithstanding that, there is a view that by compelling beneficiaries to accept any job irrespective of the wage that comes with it for the sake of keeping benefits could result in some kind of wage dumping. Another issue raised is that there is a likelihood of more people being employed in low income jobs in future. These are valid points. Nonetheless, the creation of a low wage sector is ideal for providing jobs to the currently disproportionately unemployed low skilled persons. Secondly, there are sanctions aimed at unemployed persons who reject acceptable work. Even so, these sanctions are criticised for being ineffective in their quest to compel unemployment benefit II beneficiaries to take up acceptable work. For instance, it is argued that employees of the placement services and the municipalities are often reluctant to impose sanctions in practice.

Focusing on employment protection, employers in Germany have (in general) both substantive and procedural requirements to comply with prior to discharging (an) employee(s). In as far as substantive requirements are concerned, an ordinary dismissal is legally invalid if it is not based on an employee's personality, the behaviour of an employee or the operational requirements of an employer. Procedural requirements, on the other hand, include the provision of notice of termination, duty to consult the works council, and additional measures in the case of collective dismissals such as the duty to consult the works council, and notification of a competent public authority. The requirement that employers, at times dependent on the number of employees they intend to retrench, should first request permission from or notify the designated authorities before they retrench employees can be found in many countries, including India. This approach is ideal for South Africa if it is to be linked to broader unemployment protection measures such as those that are aimed at the

(re)integration of the unemployed into the labour market. At the moment, the South African unemployment protection system has limited measures aimed at the (re)integration of retrenched individuals into the labour market. In addition, the German employment protection law makes provision for severance pay. Furthermore, there are certain categories of employees who enjoy a higher degree of employment protection. These employees include pregnant women, mothers and employees on childcare leave; employees with disabilities; members of the works council; and apprentices and employees on compulsory military training or community service. This approach is, in some instances, consistent with international standards. For example, the protection afforded to pregnant women is in accordance with the *Termination of Employment Convention* (1982) and the *Maternity Protection Convention* (2000).

Despite the foregoing, it should be pointed out that the *Protection against Dismissal Act* applies to enterprises where more than ten employees are employed, provided that an employee has been employed for an uninterrupted period longer than six months in that establishment. Furthermore, the employer's duty to consult the works council prior to any dismissal does not apply to small enterprises with less than five employees. This is mainly because the *Works Constitution Act* applies only to enterprises with at least five employees.

4.2. India

The Indian (un)employment protection system, as typical of developing countries, is not that well developed. Starting with the unemployment protection system, India is yet to adopt a system of unemployment insurance. Instead, much emphasis is placed on an employer liability system. Through this system the unemployment compensation burden is placed on employers. This approach is disadvantageous to employers mainly due to the fact that under the unemployment insurance system, the financing of unemployment benefits is normally a duty shared by employers and the employees. And in some instance, the state covers any financial deficits that may accrue in any financial year to keep the unemployment insurance system running. Furthermore, the employer liability scheme covers a small percentage of the population. Therefore, it is suggested in this chapter that India introduce an unemployment

insurance scheme. Such a scheme need not cover the entire workforce at its inception. For instance, it could limit its scope of coverage to a certain section of the labour force and progressively expand to include the excluded groups and categories of persons.

Despite the foregoing, in India different schemes make provision for unemployment-related benefits such as sickness and maternity benefits. This is different from the South African approach where maternity, sickness, unemployment and survivors' benefits are lumped under a single scheme (i.e. the unemployment insurance scheme). In spite of that, it should be mentioned that the Indian social security schemes, particularly in the area of unemployment protection, exclude and marginalise a vast portion of the Indian working population. The qualifying conditions for sickness and maternity benefits provided under the ESI, for example, marginalise casual workers. At the core of the issue of exclusion and marginalisation lies, among others, the fact that formal social security is confined to the formal labour market much to the neglect of the majority of persons who participate in the unorganised sector. In an attempt to extend social security to the unorganised sector, India has cess-financed Welfare Funds. The Welfare Funds are criticised on the basis that: they tend to be bureaucratic and lacking in initiative; their administrative cost has been high; their lack of a registration system renders the identification of beneficiaries problematic and the widespread non-implementation of the requirement that employers issue identity cards results in the exclusion of large pockets of employees from benefits they are entitled to. India's innovative advance in its quest to extend social security to the unorganised sector does not stop with the Welfare Funds model. For example, it launched in January 2004 a national social security scheme aimed at the unorganised sector dubbed the Unorganised Sector Workers' Social Security Scheme. This scheme, which is implemented on a pilot basis in fifty districts over a five-year period, is aimed at providing the unorganised sector with pension, hospitalisation and disablement benefits. While recent efforts launched by the Indian government to extend social security to the unorganised sector need not be overlooked, the truth is that much more remains to be done if India is to provide a comprehensive (un)employment protection to its populace.

In addition, there are other unemployment protection measures which are funded from the general government revenues. These measures include social assistance benefits and income generating schemes such as the Employment Intensive Programmes (EIPs). As pointed out in this chapter, the Indian social assistance scheme stands accused of two things. Firstly, the value of the benefits it provides are criticised for being too low. Secondly, it has been reported that the level of awareness about the state's social assistance scheme for the old is low. This, so it argued in this chapter, is counter-productive for the reason that it results in a low take-up rate. Low take-up rate in turn undermines the poverty alleviation effect of social assistance benefits. It nevertheless follows that social assistance benefits play an important role in easing the impact of unemployment (and underemployment) which usually presents itself in the form of poverty. No matter how modest social assistance benefits are, it is true that they do have a positive impact on alleviating poverty among the poorest of the poor. As regards the employment guarantee schemes, the chapter concludes that they (alongside social assistance programmes) have an important social security function – particularly within the framework of an unemployment protection system. This assertion is premised on a view that employment guarantee schemes are a useful tool in securing gainful employment for those who are able to work whereas social assistance programmes are crucial for providing benefits to those individuals who are unable to provide for themselves and those dependent on them due to, *inter alia*, poor health, age or disability.

Alongside the government-run schemes (e.g. social assistance benefits and income generating schemes) there are kinship and community-based safety nets as well as member organisation-based informal safety nets. The kinship-based safety nets, as it is the case in other developing countries, are gradually wearing away. Traditional families are not as closely knit as they used to be. On the other hand, there are a number of member organisation-based informal safety nets operating in India which provide unemployment protection services. For instance, the Self Employed Women's Association (SEWA), through its insurance-based work security scheme provides cover to its members against those risks which often pose a serious threat to their lives and work such as illness, widowhood, accident, fire, communal riots, floods and other such natural and human-made calamities. This is innovative and well focused on the needs of the self-employed vulnerable women.

The truth is that, in practice, tools used to ply respective trades as well as health or ability to perform tasks are the most important assets that the vulnerable need in order to cope with insecurity.

As regards employment protection, India (similarly to South Africa and Germany) has enacted laws making provision for employment protection. This is the case despite India's non-ratification of the *Termination of Employment Convention* (1982) as well as other employment protection-related ILO instruments such as the *Freedom of Association and Protection of the Right to Organise Convention* (1948) and the *Right to Organise and Collective Bargaining Convention* (1949). The employment protection provisions contained in Indian laws outline the administrative restrictions and procedures to curb dismissals as well as, in some instances, severance pay. An employer may lawfully terminate an employee's contract of employment on the basis of misconduct, incapacity and operational requirements of the employer. In addition, employers are required to provide notice of termination of employment or payment *in lieu* of notice to permanent employees. There are also additional measures for collective measures (e.g. providing notice to a public office and payment of severance pay). These employment protection measures are extremely important for Indian workers – particularly when one considers the high unemployment situation as well as the inadequacy of the unemployment protection system in that country.

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

1. INTRODUCTION

The purpose of this investigation, as the title suggests, is to redesign the South African unemployment protection system. In its quest to realise its set goal, the study – while placing a particular emphasis on legal hindrances, challenges and implications – identifies existing deficiencies in the present unemployment protection system. Once the existing deficiencies have been identified, proposals on how to address these shortcomings are brought to the fore. The process of highlighting shortcomings and proposing ways and means to remedy same is executed by examining the South African, German and Indian unemployment protection legislative frameworks as well as unemployment protection (-related) international (ILO), supranational (the EU) and regional standards (the Council of Europe and SADC). In this chapter a selection of conclusions reached and recommendations made which are extracted from this analysis are presented in two parts, namely: *unemployment protection* and *employment protection*.

2. UNEMPLOYMENT PROTECTION

2.1. Introduction

In examining the unemployment protection system in South Africa, the study concludes that South Africa covers the risk of being unemployed through an *unemployment insurance scheme* and, to a certain extent, by *social assistance grants*. Alongside the aforesaid typical unemployment protection schemes (i.e. unemployment insurance scheme and the social assistance benefits), there are *public programmes* (i.e. public works programmes and skills development programmes) and *informal coping strategies or mechanisms* (i.e. informal social security) which minimise the effect and impact of unemployment.

2.2. Unemployment insurance scheme

2.2.1. Recent unemployment insurance laws: Progression or regression?

The introduction of the new *Unemployment Insurance Act* (UIA) and its sister act, the *Unemployment Insurance Contributors Act* (UICA), ushered in a variety of important changes to the unemployment insurance system in South Africa. For instance, the UIA extended the scope of unemployment insurance coverage to certain previously excluded groups of persons which include *domestic workers*, *seasonal workers* and the so-called *high income earners*. Nonetheless, there are several points of criticism that the study levels against the South African unemployment insurance system.

Firstly, the scope of coverage of the unemployment insurance scheme is still limited. For instance: *persons who do not fall within the definition of ‘employee’* (as contained in the UIA), *civil servants* and *non-citizen fixed-term contract workers* (who are required to return to their home countries at the end of their contracts of employment) are excluded and marginalised from the current scheme. Vulnerable categories of workers excluded from the ambit of the unemployment insurance scheme, due to the UIA’s definition of ‘employee’ which is narrower than that contained in labour laws (for example, the *Basic Conditions of Employment Act* and the *Labour Relations Act*), comprise largely of the *atypical workers* (such as the independent contractors, the dependent contractors, and the self-employed), the *informally employed* (particularly those persons who are involved in unpaid care work) and the *long-term unemployed*. At an international level, it appears that most unemployment protection ILO instruments – similar to the South African unemployment insurance laws – tend to exclude the informally employed and certain categories of atypical workers from the envisaged unemployment insurance schemes.¹⁶⁴⁸ Nevertheless, it should be remembered that the standards contained in the ILO instruments dealing with unemployment do not preclude member states from including any of the excluded groups under their schemes. Part IV (that is the part concerning

¹⁶⁴⁸ See paragraph 2.2.2.2. in chapter 4.

unemployment benefit) of the *Social Security (Minimum Standards) Convention*, for example, sets only minimum standards and member states can choose between alternative standards. This is in line with the flexibility principle embodied in some of the international unemployment protection instruments (e.g. the *Social Security (Minimum Standards) Convention*). Viewed at a regional level, the exclusions contained in the South African unemployment insurance scheme are, it is opined, not in line with the SADC social security instrumental framework. For example, article 10(1) of the SADC Social Charter requires SADC member states – which include South Africa – to create an enabling environment so that *every worker* in the region shall have the *right to adequate social protection* and shall, *regardless of status and the type of employment*, enjoy adequate social security benefits.

Accordingly, the study argues that South Africa should as a matter of priority extend unemployment protection to the abovementioned categories of excluded and marginalised workers. The following are some of the possible routes that may be adopted in an attempt to extend coverage:

- (a) Access to the unemployment insurance scheme could be progressively extended to new categories of currently excluded workers. Section 27(2) of the Constitution does require the state to achieve the progressive realisation of everyone's right of access to social security. In addition, the *Employment Promotion and Protection against Unemployment Recommendation* obliges member states to endeavour to extend progressively the application of their legislation concerning unemployment benefit to cover all employees.
- (b) The current unemployment insurance scheme could be adapted so as to facilitate partial or voluntary participation of the self-employed as well as other categories of persons working in the informal economy. As regards voluntary participation in the unemployment insurance scheme, South Africa could adopt the German approach whereby self-employed persons or persons caring for a relative at home have an opportunity to voluntarily contribute towards the unemployment

insurance scheme in order to maintain or to reach their entitlements. The advantage of this system is that it ensures that persons who migrate from contributory employment to self-employment or unpaid care work do not lose their entitlement to benefits. In an event South Africa introduces a voluntary contributory system (for self-employed persons and informal economy employees) it could require (voluntary) contributors to contribute 1% of their income to the UIF. Eventually, the value of benefits paid must be commensurate to the contribution rate. Alternatively, it could oblige (voluntary) contributors to contribute 2% of their income. It should be recalled that unemployment insurance in South Africa is financed through a proportional employer (1% of the remuneration) and employee (1% of the remuneration) contributions. Turning now to informal economy workers, South Africa could draw valuable lessons from the Indian Welfare Funds model.¹⁶⁴⁹ These funds, which are funded by means of cess (earmarked tax) levied on items such as production, sale or export of certain goods, has the ability to bypass the difficulties associated with the extension of ‘contribution-oriented’ or ‘employer-liability-oriented’ social security schemes to the informal economy. This assertion is informed by the fact that Welfare Funds, generally speaking, operate outside the specific employer-employee relationship framework. Nonetheless, further research is necessary prior to the adoption of such a model in South Africa. The aim of the aforesaid research should essentially be to uncover alternatives on avoiding the challenges facing the Indian welfare funds such as high overheads and to tailor the model to the South African set-up. India’s innovative advance in its quest to extend social security to the informal economy does not stop with the Welfare Funds model.

- (c) A specific benefit package could be designed or an alternative unemployment insurance scheme could be launched. Nevertheless, this benefit package or alternative scheme should be appropriate to the needs and contributory capacity of the excluded and marginalised categories of workers.

¹⁶⁴⁹ See paragraph 3.4.4.1. in chapter 5.

Turning now to the exclusion of civil servants, it should be mentioned that at ILO level there are unemployment protection instruments (such as the *Employment Promotion and Protection against Unemployment Convention*) which permit the exclusion of civil servants from the ambit of the unemployment insurance scheme. However, the exclusion of civil servants is allowed (e.g. by the aforesaid instrument) only in a situation where these employees have their employment guaranteed up to the normal retirement. Countries such as Germany do exclude this category of workers from their unemployment insurance schemes. Such exclusion could be viewed as being in accordance with international standards given the high level of employment security enjoyed by civil servants (the *Beamte*) in that country. Can the same be said about the exclusion of civil servants in South Africa? In light of the fact that the risk of being unemployed in South Africa is as high for civil servants as it is for private sector workers, it is argued in this study that the exclusion of the South African civil servants is not in accordance with the *Employment Promotion and Protection against Unemployment Convention*. South Africa is yet to ratify this instrument. Nevertheless, it is a member of the ILO. As a result, South Africa should ensure that the scope of coverage of its unemployment protection scheme is in tune with that envisaged by ILO instruments such as this. To this end, it is recommended that the inclusion of civil servants should be given priority in South Africa. South Africa could, for example, consider incorporating civil servants into the current unemployment insurance scheme or establishing a public-service specific scheme, allowing civil servants to contribute on their own (even though this could be a candidate for a constitutional challenge), or making an arrangement (like in Belgium) whereby civil servant contribute their 1% of their salaries to the UIF while the state repays the Fund for paid out benefits on a pay-as-you-go basis.¹⁶⁵⁰

As regards the exclusion of non-citizen fixed-term contract workers, it is argued in this investigation that this could be challenged as discriminatory on the basis of nationality.¹⁶⁵¹ The equality of treatment is not only required by the South African Constitution but also by international standards. South Africa has ratified the

¹⁶⁵⁰ Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 441.

¹⁶⁵¹ See s 9 of the Constitution of South Africa.

Unemployment Convention. This Convention requires South Africa to make arrangements so as to ensure that non-citizens from such countries who are employed in South Africa are eligible for the same rate of (unemployment insurance) benefit as that available to local workers.¹⁶⁵² The absence of these arrangements in South Africa as regards non-citizen fixed-term contract workers, so the study concludes, is in violation of its international obligations.¹⁶⁵³ Germany, which is one of member states that have ratified this Convention, has concluded a variety of bilateral agreements dealing with unemployment insurance.¹⁶⁵⁴ To this end, the study suggests that South Africa could learn from the German example and conclude such agreements so as to further comply with its international duties. While still on the subject of the exclusion of non-citizen fixed-term contract workers, it should be said that such an exclusion which also affects SADC citizens is compounded by the serious lack of coordination of social protection schemes in that region.

In addition to the discussion on the limited scope of coverage, there are several regressive steps which the new unemployment insurance laws introduced. They include the following:

- (a) The Minister of Labour was stripped of the power to introduce schemes to combat unemployment. This step, it is opined, undermines one of the measures contained in the previous UIA to (re)integrate the unemployed into the labour market. This is problematic seeing that the goal of an unemployment protection system is (or should be) the prevention of unemployment and the reintegration of the unemployed into the labour market. And once unemployment is unavoidable, it should (endeavour to) minimise the effect(s) of unemployment through an unemployment benefit (in cash and/or kind). The provision of an unemployment benefit should – as an expression of the value of employment to individuals, families and the community at large – be supported by (re)integrative measures.

¹⁶⁵² Article 3 of the *Unemployment Convention* 2 of 1919.

¹⁶⁵³ Olivier MP and Van Kerken ET “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415 at 442.

¹⁶⁵⁴ See paragraph 2.1. in chapter 5.

- With the foregoing in mind, South Africa should as a matter of priority strive at ensuring that its unemployment insurance system (adequately) links income security and employment prevention, protection and promotion.
- (b) Except in the case of domestic workers, the contingency covered by the unemployment insurance scheme does not include partial unemployment. This approach differs considerably from that embraced by international social security standards¹⁶⁵⁵ and countries such as Germany where the contingency covered includes both partial and full unemployment to insured contributors. To remedy this situation, it is recommended that South Africa should broaden the nature of the contingency covered under its unemployment insurance scheme so as to include partial unemployment for all insured employees. In any event, this was the situation prior to the introduction of the current UIA. The broadening of the contingency covered will assist in maintaining the employment relationship in the sense that employers will be enabled to retain a skilled and experienced work force while workers avoid (full) unemployment.¹⁶⁵⁶ This, it is argued, will put the nature of the contingency covered under the unemployment insurance system more in line with that of the up-to-date Conventions in the unemployment protection field – particularly the *Employment Promotion and Protection against Unemployment Convention*.
- (c) The current system does not bar entitlement to benefits in a case where a contributor is unemployed on account of his or her own misconduct. The same applies in the case where a contributor is unemployed due to an illness arising from his or her own wrongdoing. South Africa could, in this regard, learn from the German approach and proscribe entitlements to illness benefits in the aforesaid situation. The exclusion of employees who are unemployed as a result of their own wrongdoing is in conformity with the principle that contributors who deliberately contribute towards their unemployment should not draw any benefits.

¹⁶⁵⁵ See chapter 4 of this study.

¹⁶⁵⁶ ILO *Social Security for the Unemployed* (ILO (1976)) 28.

- (d) Employees who receive remuneration under a learnership agreement registered in terms of the *Skills Development Act* and their employers are not covered by the UIA and UICA. The exclusion of this group is unfortunate since they fell under the ambit of the previous *Unemployment Insurance Act*.

2.2.2. Unemployment benefits: The importance of introducing different schemes for unemployment-related benefits

The South African unemployment protection system lumps maternity, adoption, sickness, unemployment and survivors' benefits under a single scheme (i.e. the unemployment insurance scheme). This differs significantly from the approach of countries such as Germany and India where different schemes make provision for unemployment-related benefits. It is suggested that South Africa should consider the establishment of separate schemes to cater for unemployment-related benefits such as maternity, adoption and sickness benefits. These benefits stretch the financial capacity of the UIF and divert the focus of the UIF from pressing issues such as preventing and combating unemployment.

2.3. Social assistance scheme: The need for appropriate assistance for the unemployed

The social assistance grants available in South Africa are largely categorical by nature. This spells out one thing – those unemployed persons who do not fit in one of the predetermined categories or never contributed to the unemployment insurance scheme or exhausted their unemployment insurance benefits are left at the mercy of poverty, as there are no state financed benefits (specifically targeted at the unemployed persons) available. In view of the insurance nature of the current scheme, the study argues that it cannot be expected of an unemployment insurance scheme to accommodate individuals who are not employed, such as the unemployed youth and women who are involved in unpaid care work. With a view of either introducing or expanding the scheme a detailed and extensive investigation should be conducted on one or a combination of the

following tax financed alternatives, i.e. the *introduction of universal benefits*, the *gradual extension of social assistance benefits* and/or *tax financed services* or *combining universal benefits with tax financed benefits or services*.¹⁶⁵⁷

2.4. Public programmes: Some issues and challenges

Public works programmes, on the one hand, do not provide a long-term solution to the problem of unemployment. And the prospects of (re)integrating those who participate in the public works programmes into the labour market remain low. Another problem is that there is a risk that public works programmes could lure low-paid workers in the formal and informal economy workers. Skills development programmes are, on the other hand, more focused on the formal economy. They pay little or no attention to the training needs of those engaged in the informal economy despite the high levels of vulnerability normally associated with that part of the economy. This insensitivity towards the training and skills development needs of the informal economy has negative results. The lack of or limited access to training and skills development effectively means that skills development in this part of the economy will remain stagnant and unresponsive to the changing needs of the labour market. Consequently this has a negative impact on the (re)integration of informal economy participants into the formal economy. The absorption capacity of the South African formal economy is limited. In view of that, skills upgrading in the informal economy should be made an integral component of the overall skills strategy in South Africa. And, the reimbursement of portions of the skills development levies to employers has proved to be an insufficient incentive. This is problematic in the sense that it results in the under-utilisation of the Skills Development Funds. Another source of concern is South Africa's poor efforts to co-ordinate the private and public employment agencies as required by the *Unemployment Convention* (1919). This requires serious attention, particularly in view of the fact that there has been several direct requests from the Committee of Experts on the Application of Conventions and Recommendations (CEACR) to the government of South Africa to furnish it with

¹⁶⁵⁷ See paragraph 1.2.2.2. in chapter 3.

information on the steps taken to co-ordinate the operation of public and private employment services as requested by the *Unemployment Convention*.

2.5 Recognition and reinforcement of informal coping mechanisms and strategies

Informal coping mechanisms and strategies are an important component of the South African unemployment protection system. However, they have their particular limitations and challenges. For instance, they provide *insufficient protection*, are *unreliable*, *inconsistent* and *unstable*, and are *susceptible to external shocks*.¹⁶⁵⁸ In light of these limitations and challenges, it is recommended that the membership-based informal social security arrangements be strengthened. Such an exercise could include recognition by the South African government that informal coping strategies do provide social protection; provision of training to members of mutual support schemes so as to equip them with, *inter alia*, administrative skills; and provision of financial assistance by government and non-governmental organisations.¹⁶⁵⁹ Most importantly, linkages between formal social security schemes and informal coping strategies need to be established. Nonetheless, it should be emphasised that the strengthening of these coping strategies does not mean that the government could abdicate its duty to provide access to or create an appropriate social security framework for those who are excluded from formal social security coverage.

2.6. ILO social security instruments: Some observations from an unemployment protection perspective

2.6.1 Tax-financed scheme is supposed to be complementary to the unemployment insurance scheme

Some ILO unemployment protection instruments, such as the *Unemployment Protection Convention* (1934), require that tax-financed benefits be provided alongside the

¹⁶⁵⁸ See paragraph 2.42. in chapter 3.

¹⁶⁵⁹ See paragraph 2.4.3. in chapter 3.

contribution-financed benefits.¹⁶⁶⁰ The overall goal, so it seems, is to ensure that individuals who have exhausted their benefits or those who have not yet acquired the right to benefits are not left destitute. Nevertheless, in South Africa there is no complementary tax-financed scheme as envisaged by, for example, the *Unemployment Protection Convention*. It is doubtful if the social assistance grants currently available in South Africa would (sufficiently) fulfil the role of the complementary tax-financed scheme as foreseen by the relevant ILO instruments dealing with unemployment. This is largely due to the limited scope of coverage of the current social assistance system. Therefore, it is suggested once more that South Africa should investigate the possibilities of introducing or expanding one or a combination of tax-financed alternatives.¹⁶⁶¹

2.6.2. Only contributors who are capable of and available for work should draw unemployment insurance benefits

The requirement that a contributor should be capable of and available for work can be found in the South African unemployment insurance system. This is also recognised by the *Social Security (Minimum Standards) Convention* (1952) as well as the *Employment Promotion and Protection against Unemployment Convention*. Nonetheless, the South African unemployment insurance system does not prevent a contributor who becomes ill while drawing unemployment benefits from benefiting. Such unemployed contributor remains entitled to benefits as long as the claims officer is satisfied that the illness is not likely to prejudice the contributor's chance of getting a job. This, the study points out, infringes the general aim of the condition that a claimant must be capable of and available for work, which is to render the aforementioned persons ineligible for unemployment insurance benefits. Such persons should be covered under a social security scheme dealing with the risk(s) concerned. For this reason it is recommended once again that South Africa should separate pure unemployment benefits from sickness and family-related benefits (e.g. maternity benefits) as far as the unemployment insurance scheme is concerned.

¹⁶⁶⁰ See paragraph 2.2.2.3. in chapter 4.

¹⁶⁶¹ See paragraph 1.2.2.2. in chapter 3.

2.6.3. Dismal ratification record of ILO instruments in the unemployment sphere

South Africa has a dismal record as regards the ratification of ILO instruments in the unemployment sphere – particularly the up-to-date ones. As part of the endeavour to redesign its unemployment protection system, South Africa needs to align its system with the ILO (up-to-date) international unemployment standards with a view to full or partial ratification. As a matter of fact, the current scheme does – to a certain extent – meet the ILO international unemployment standards. For example, South Africa operates a compulsory unemployment insurance scheme (although imperfect) which makes provision for unemployment benefits. This is, to some extent, in line with Part IV (unemployment benefit) of the *Social Security (Minimum Standards) Convention*. In addition, the South African unemployment insurance system does provide an unemployment benefit claimant with a right to challenge the refusal, withdrawal, suspension or reduction of benefits as required by article 27 of the *Employment Promotion and Protection against Unemployment Convention* and article 70(1) of the *Social Security (Minimum Standards) Convention*.

2.7. (Re)integration measures as a crucial part of an unemployment protection system

Measures to create and promote employment, to (re)integrate the unemployed persons into the labour market and to coordinate unemployment protection and employment policies are an integral part of an unemployment protection system. This is evident from the international (ILO), supranational (the EU) and regional (Council of Europe) standards.¹⁶⁶² It should be said that there have been some remarkable efforts in South Africa to improve the current unemployment protection system. For example, some previously excluded groups of workers (e.g. domestic sector, seasonal and taxi sector workers) were brought within the ambit of the unemployment insurance framework. In addition, social partners have met on several occasions (e.g. the Presidential Job Summit

¹⁶⁶² See paragraphs 2.3., 3.4., 3.1.2.3. and 3.1.2.2. in chapter 4.

(30 October 1998)) in an attempt to formulate ways and means to address the South African unemployment problem. Nevertheless, measures to create and promote employment, to (re)integrate the unemployed persons into the labour market and to coordinate unemployment protection and employment policies remain weak or absent. For example, the South African employers are not required to notify a competent public authority about the impending collective dismissals. It is submitted that the notification of a public authority if linked with employment protection measures could be one of those ways in through linkages could be forged between employment policy and unemployment protection measures. This assertion is informed by the fact that the notification of a public authority is aimed at providing the authorities with an opportunity to prepare the labour market for the absorption of extra unemployed persons or to activate appropriate unemployment protection measures. South Africa should, as matter of urgency, redesign its unemployment protection system so as to ensure that it (adequately) links income security and employment protection and promotion.

2.8. Need to introduce social security coordination measures

Social security coordination, so the thesis argues, is crucial for *regional integration* and the *facilitation of free movement* of persons. This is apparent from the EU experience.¹⁶⁶³ In view of the fact that regional integration and the facilitation of free movement are some of the objectives of SADC, it is recommended that SADC develop its regional integration and freedom of movement policies in tandem with social security coordination policies. The *Draft Code on Social Security in the SADC* (albeit not yet in force) requires member states to extend access to social security to immigrants legally employed in their territories through social security coordination principles.¹⁶⁶⁴ Despite that SADC could draw valuable lessons from the vast EU's and Council of Europe's experiences in this field.¹⁶⁶⁵

¹⁶⁶³ See, for example, paragraph 3.1.2.1. in chapter 4.

¹⁶⁶⁴ See paragraph 52.4. in chapter 4.

¹⁶⁶⁵ See paragraphs 3.2. and 4.2.2. in chapter 4.

3. EMPLOYMENT PROTECTION

3.1. Introduction: Some general remarks

Employment protection measures, as found in international labour standards, such as the *protection against unfair dismissal, notice of termination, and severance pay* are identifiable in the South African employment protection framework. Despite that, these measures are generally *confined to formal sector employment*. And, in some cases, they *do not cover particular categories of the atypically employed*. This tendency is also discernable in the ILO employment protection instruments and the employment protection legislative framework of most SADC member states. This, it is argued in this investigation, is disadvantageous to a vast majority of workers who are engaged in the informal economy. To this end, it is recommended that employment protection laws be extended where possible to cover those individuals who eke a living in the informal economy. Most importantly, trade unions need to be encouraged to organise and/or help organise this sector. With the foregoing in mind, the study observes – in as far as the South African employment protection system is concerned – that: (a) the current statutory employment protection framework is *constitutionally suspect*, (b) employment protection is in the *interest of both employers and their employees*, and (c) employment protection is *still restricted*.

3.2. Current statutory employment protection framework is constitutionally suspect

The Constitution of South Africa entrenches a variety of fundamental rights with far-reaching implications. It makes no express provision for the right to work. But such right may be implied from certain fundamental rights such the right to fair labour practices and the right to choose one's trade, occupation, or profession freely. These rights have, to a large extent, the effect of securing the livelihood of workers. The state and employers have a duty to respect these rights. It also has an obligation to give effect to these rights. By setting the statutory employment protection framework, it could be argued, the state is

striving at fulfilling its constitutional duty to give effect to these rights. As shown in this dissertation, it is doubtful if the current statutory employment framework is wholly in compliance with Constitution. For example, the Constitution grants to every person the right to fair labour practices. On the other hand, the statutory employment protection framework limits the right to labour practices to ‘employees’ as defined in labour laws. Although they may still invoke the all-embracing constitutional right to fair labour practice to secure their employment, most atypical workers are excluded and marginalised from labour law (employment) protection. Although great strides have been made in extending employment protection, more still needs to be done to cover the excluded and marginalised workers. In the meantime, constitutional challenges against these exclusions remain a possibility. The disadvantage of extending employment protection through court cases is that litigation involves financial resources and know-how which are not always available to most excluded and marginalised groups. Another issue, as is the case with ministerial determinations, is that it expands protection slowly.

3.3. Employment protection is in the interest of both employers and their employees

Employment protection is mainly concerned with three issues, namely: protecting employees against unjustified dismissal; safeguarding – so far as possible – the well-being of those dismissed through no fault of their own; and ensuring the early reintegration of the discharged workers into the labour market.¹⁶⁶⁶ On the face of it, it seems as if employment protection favours employees much to the neglect of the employers. Nevertheless, as argued in this study, this is for the most part incorrect. Employment protection strives at accommodating the legitimate needs and interests of both employees as well as their employers. For instance, it does not impose an unqualified ban on dismissals. Instead, it recognises that an employee’s conduct or lack of capacity as well as an employer’s operational requirements may compel or require an employer to terminate an employee’s contract of employment. Furthermore, it provides

¹⁶⁶⁶ Yemin E “Job security: Influence of ILO standards and recent trends” (1976) 113 *International Labour Review* 17 at 32-33.

an employer with the right to place an employee on probation. This enables an employer to assess an employee prior to appointing the latter on permanent basis. The employers' discontent about employment protection is to a large extent unfounded.

3.4. Employment protection is still restricted

It is evident that employment protection is an essential component of the South African unemployment protection system. Nevertheless, the scope of coverage of employment protection as contained in labour laws is restricted to those persons who fit the employee definition. As pointed above,¹⁶⁶⁷ the majority of atypical workers are excluded and marginalised from employment protection. This is disappointing for the fact that atypical work is one of the most precarious forms of employment in South Africa. To make matters worse, atypical workers are often among the least unionised categories of workers. To remedy this situation, it is suggested that trade unions be encouraged to expand their activities to the informal economy. This could include, among others, assisting informal economy workers to organise themselves by means of capacity building exercises. Greater trade union involvement, it is opined, has a strong potential of providing informal economy workers with a voice to garner support for their inclusion under various employment protection measures. As regards the possibility of a constitutional challenge, it should be noted that such a challenge involves financial resources and know-how which are not always available to most excluded and marginalised groups – which atypical workers form part of. It is true that South Africa has endeavoured to extend the scope of the labour law protection (which includes employment protection) to most workers. Nonetheless, more still needs to be done to ensure broader coverage. Furthermore, some of the mechanisms used to broaden coverage remain objectionable. For instance, the use of ministerial determinations to extend coverage bestows the power to expand labour law protection on a bureaucratic mechanism, namely a governmental office-bearer (i.e. the Minister), rather than the legislature. Furthermore, this method extends coverage slowly.

¹⁶⁶⁷ See paragraph 3.2. in chapter 6.

BIBLIOGRAPHY

ARTICLES

- Abedian I and Standish B "Poor whites and the role of the state: The evidence" (1985) 52 *South African Journal of Economics* 141.
- Adams S "Government gives struggling parents good news" (20 August 2004) *The Star* 5.
- Ahmad E "Social security and the poor: Choices for developing countries" (1991) 6 *World Bank Research Observer* 105.
- Ahmed I "Decent work and human development" (2003) 142 *International Labour Review* 263.
- Aliber M "Chronic poverty in South Africa: Incidence, causes and policies" (2003) 31 *World Development* 473.
- An international survey of part-time work: II "Social security for part-time workers" (1963) 88 *International Labour Review* 490.
- Anker R *et al* "Measuring decent work with statistical indicators" (2003) 142 *International Labour Review* 147.
- Amjad R "Employability in the global economy and the importance of training: A summary of the 1998-99 ILO World Employment Report" (1999) 20 *Comparative Labor Law & Policy Journal* 715.
- Bak M "Can developmental social welfare change an unfair world?: The South African experience" (2004) 47 *International Social Work* 81.
- Barrie GN "Ubuntu ungamuntu ngabanye abantu: The recognition of minority rights in the South African constitution" (2000) 2 *TSAR* 271.
- Baxandall P "Explaining differences in the political meaning of unemployment across time and space" (2002) 31 *Journal of Socio-Economics* 469.
- Becker M "Caring for children and caretakers" (2001) 76 *Chicago-Kent Law Review* 1495.
- Beattie R "Social protection for all: But how" (2000) 139 *International Labour Review* 129.

- Bercusson B "The European Community's Charter of Fundamental Social Rights of Workers" (1990) 53 *Modern Law Review* 624.
- Bescond D *et al* "Seven indicators to measure decent work: An international comparison" (2003) 142 *International Labour Review* 179.
- Bhorat H "Is a universal income grant the answer?" (2002) 26 *SA Labour Bulletin* 19.
- Binswanger HP, Francis E and Williams G "The land question" (1993) 27 *Canadian Journal of African Studies* 380.
- Bonnet F *et al* "A family of decent work indexes" (2003) 142 *International Labour Review* 213.
- Boyd JB "A subsystemic analysis of the Southern African Development Coordination Conference" (1985) 28 *African Studies Review* 46.
- Bromley DW "South Africa – where land reform meets land restitution" (1995) 23 *Land Use Policy* 99.
- Burgess M "Introduction: Federalism and building the European Union" (1996) 26 *Publius: Journal of Federalism* 1.
- Burman S "Intergenerational family care: Legacy of the past, implications for the future" (1996) 22 *Journal of Southern African Studies* 585.
- Byrne D and Strobl E *Defining Unemployment in Developing Countries: The Case of Trinidad and Tobago* (Centre for Research in Economic Development and International Trade (2001)).
- Caracciolo E "The 'family-friendly workplace': The EC position" (2001) 17 *International Journal of Comparative Labour Law and Industrial Relations* 325.
- Carnoy M "The family, flexible work and social cohesion at risk" (1999) 138 *International Labour Review* 411.
- Carlson E *Differing Labour Market Concepts, Definitions and Measurements: Japan, USA, Australia* (Centre of Full Employment and Equity (2001)).
- Carter M and May J "Poverty, livelihood and class in rural South Africa" (2001) 27 *World Development* 1.
- Carter M and May J "One kind of freedom: Poverty dynamics in post-apartheid South Africa" (2001) 29 *World Development* 1987.

- Casey BH and Gold M “Peer review of labour market programmes in the European Union: What can countries really learn from one another?” (2005) 12 *Journal of European Public Policy* 26.
- Chaskalson A “Human dignity as a fundamental values of our constitutional order” (2000) 16 *South African Journal on Human Rights* 193.
- Chatterji PC “Affirmative action programs (India): Cultural concerns” (2001) *International Encyclopedia of Social & Behavioral Sciences* 218.
- Christensen A and Malmstedt M “*Lex Loci Laboris* versus *Lex Loci Domicilli* – An inquiry into the normative foundations of European social security law” (2000) 2 *European Journal of Social Security* 69.
- Christopher AJ “Land restitution in South Africa, 1991-94” (1995) 12 *Land Use Policy* 267.
- Closa C “The concept of citizenship in the Treaty on European Union” (1992) 29 *Common Market Law Review* 1137.
- Cockrell A “The South African Bill of Rights and the ‘Duck/Rabbit’” (1997) 69 *Modern Law Review* 513.
- Collins H “Discrimination, equality and social exclusion” (2003) *Modern Law Review* 16.
- Cock J “Engendering gay and lesbian rights: The equality clause in the South African constitution” (2003) 26 *Women’s Studies International Forum* 35.
- Cooper C “Right to fair labor practices” (2005) 26 *Comparative Labor & Policy Journal* 199.
- Corder H “Towards a South African Constitution” (1994) 57 *Modern Law Review* 491.
- Cowen DV “Legislature and judiciary: Reflections on the constitutional issues in South Africa (Part I)” (1952) 15 *Modern Law Review* 282.
- Cowen DV “Legislature and judiciary: Reflections on the constitutional issues in South Africa (Part II)” (1953) 16 *Modern Law Review* 273.
- Crankshaw O “Changes in the racial division of labour during the apartheid era” (1996) 22 *Journal of Southern African Studies* 633.
- Dancaster L “Domestic workers and the law” (2003) 27 *South African Journal of Labour Relations* 109.

- Dev SM "India's (Maharashtra) Employee Guarantee Scheme" in Von Braun J (ed) *Employment for Poverty Reduction and Food Security* (International Food Policy Research Institute (1995)) 108.
- Dickens L "Comparative systems of unjust dismissals: The British case" (1994) 536 *Annals of the American Academy* 43.
- Donald J *et al* "Racial differences in occupational status and income in South Africa, 1980 and 1991" (1996) 33 *Demography* 111.
- Du Plessis L "Freedom of or freedom from religion? An overview of issues pertinent to the constitutional protection of religious rights and freedom in "the new South Africa"" (2001) 2 *Brigham Young University Law Review* 437.
- Eatwell J "Unemployment: National policies in a global economy" (2000) 21 *International Journal of Manpower* 343.
- Eger T "Opportunistic termination of employment contracts and legal protection against dismissal in Germany and the USA" (2004) 23 *International Review of Law and Economics* 381.
- Elder S and Johnson LJ "Sex-specific labour market indicators: What they show" (1999) 138 *International Labour Review* 447 at 459.
- Engblom S "Equal treatment of employees and self-employed workers" (2001) 17 *International Journal of Comparative Labour Law and Industrial Relations* 211.
- Evans-Klock C *et al* "Worker retrenchment: Preventative and remedial measures" (1999) 138 *International Labour Review* 47.
- Fields GS "Decent work and development policies" (2003) 142 *International Labour Review* 239.
- Fineman MA "Contract and care" (2001) 76 *Chicago-Kent Law Review* 1403.
- Frankel P "The politics of passes: Control and change in South Africa" (1979) 17 *Journal of Modern African Studies* 199.
- Fraser N "How strong is the case for targeting active labour market policies?: A review of efficiency and equity arguments" (1999) 20 *International Journal of Manpower* 151.
- Freeman C *et al* "Diffusion and the employment effects of information and communication technology" (1995) 134 *International Labour Review* 587.

- Fultz E and Pieris B *Social Security Schemes in Southern Africa: An Overview and Proposals for Future Development* (ILO/SAMAT (1999)).
- Fultz E and Pieries B *The Social Protection of Migrant Workers in South Africa* (ILO/SAMAT (1997)).
- Galin A “Small manufacturing enterprises as a form of flexibility” (1999) 15 *International Journal of Comparative Labour Law and Industrial Relations* 289.
- Gathiram N and Hemson D “Transformation of welfare?: Race, class, and gender in the management of welfare agencies in South Africa” (2002) 37 *Community Development Journal* 209.
- Gilbert L and Walker L “Treading the path of least resistance: HIV/AIDS and social inequalities – a South African case study” (2002) 54 *Social Science & Medicine* 1093.
- Ghai D “Decent work: Concept and indicators” (2003) 142 *International Labour Review* 113.
- Goetschy J “The European employment strategy from Amsterdam to Stockholm: Has it reached its cruising speed?” (2001) 32 *Industrial Relations Journal* 401.
- Gordon WB “The plight of the women of Lesotho: Reconsideration with decline of Apartheid?” (1994) 24 *Journal of Black Studies* 435.
- Graser A “From the hammock onto the trampoline: Workfare Policies in the U.S and their reception in Germany” (2003) 4 *German Law Journal* 201.
- Gray HR “The sovereignty of parliament today” (1953) 10 *University of Toronto Law Journal* 54.
- Guhan S “Social security options for developing countries” (1994) 133 *International Labour Review* 35.
- Gupta AKS and Sett PK “Industrial relations law, employment security and collective bargaining in India: Myths, realities and hopes” (2000) 31 *Industrial Relations Journal* 144.
- Haffajee F “More grants no big” *Mail & Guardian* 3-9 September 2004.
- Hamilton VL “Hard times and vulnerable people: Initial effects of plant closing on automaker’s mental health” (1990) 31 *Journal of Health and Social Behaviour* 123.
- Hansungule M “Who owns land in Zimbabwe? In Africa?” (2000) 7 *International Journal on Minority and Group Rights* 305.

- Harris DJ "A fresh impetus for the European Social Charter" (1992) 41 *International and Comparative Law Quarterly* 659.
- Harriss-White B "Inequality at work in the informal economy: Key issues and illustrations" (2003) 142 *International Labour Review* 459.
- Heer B "Employment and welfare effects of a two-tier unemployment compensation system" (2003) 10 *International Tax and Public Finance* 147.
- Henkin L "Rights here and there" (1981) 81 *Columbia Law Review* 1582.
- Hepple B "Equality and empowerment for decent work" (2001) 140 *International Labour Review* 5.
- Hepple B "The implementation of the Community Charter of Fundamental Social Rights" (1990) 53 *Modern Law Review* 643.
- Henrard K "Post apartheid South Africa's democratic transformation process: Redress of the past, reconciliation and 'unity in diversity'" (2002) 1 *Global Review of Ethnopolitics* 18.
- Heseler H and Mückenberger U "The management of redundancies in Europe: The case of Germany" (1999) 13 *Labour* 183.
- Hill CR "Regional co-operation in southern Africa" (1983) 82 *African Affairs* 215.
- Ho LS "Wage subsidies as a labour market policy tool" (2000) 33 *Policy Sciences* 89.
- International Labour Conference *Fifty-Seventh Session–1972: Record of Proceedings* (ILO (1972)).
- Jenkins P "Difficulties encountered on community involvement in delivery under the new South African housing policy" (1999) 23 *Habitat International* 431.
- Jorens Y *et al* "Co-ordination of the social security systems and the accession of Central and Eastern European countries to the European Union" (1999) 1 *European Journal of Social Security* 269.
- Jorens Y and Schulte B "The implementation of Regulation 1408/71 in the Member States of the European Union" (2001) 3 *European Journal of Social Security* 237.
- Keller B "The Hartz Commission recommendations and beyond: An intermediate assessment" (2003) 19 *International Journal of Comparative Labour Law and Industrial Relations* 363.

- Kingdon GG and Knight J “Unemployment in South Africa: The nature of the beast” (2004) 32 *World Development* 391.
- Klug H “Co-operative government in South Africa’s post-apartheid constitutions: Embracing the German model?” (2000) 33 *Verfassung und Recht Übersee* 432.
- Klug H “South Africa’s new constitution: The challenges of diversity and identity” (1995) 28 *Verfassung und Recht Übersee* 421.
- Körner M “German labor law in transition” (2005) 6 *German Law Journal* 805.
- Krishnaswami L “From drudgery to dignity: The SEWA experience” (1985) 10 *Labour and Society* 323.
- Lee E “Globalization and employment: Is anxiety justified?” (1996) 136 *International Labour Review* 485.
- Leibbrandt M and Woolard I “The labour market and household income inequality in South Africa: Existing evidence and new panel data” (2001) 13 *Journal of International Development* 689.
- Limbach J “The concept of the supremacy of the constitution” (2001) 64 *Modern Law Review* 1.
- Lipton M and Lipton M “Creating rural livelihoods: Some lessons for South Africa from experience elsewhere” (1993) 21 *World Development* 1515.
- Lloyd-Sherlock P “Old age and poverty in developing countries: New policy challenges” (2000) 28 *World Development* 2157.
- Loh ES “Employment probation as sorting mechanism” (1994) 47 *Industrial and Labor Relations Review* 472.
- Longmore L “South Africa: A new Constitution?” (1959) 58 *African Affairs* 141.
- Low L “Social protection in the ‘new’ economy” (2002/03) *Bulletin on Asia-Pacific Perspectives* 29.
- Lönnroth J “Global employment issues in the year 2000” (September 1994) *Monthly Labor Review* 5 at 5.
- Löwisch M “Job safeguarding as an object of the rights of information, consultation, and co-determination in European and German law” (2005) 26 *Comparative Labor Law and Policy Journal* 371.

- Lund F “‘Crowding in’ care, security and micro-enterprise formation: Revisiting the role of state in poverty reduction and in development” (2002) 14 *Journal of International Development* 681.
- Malherbe R “A new beginning: Introducing the South African constitution and Bill of Rights” (2000) 1 *Netherlands Quarterly of Human Rights* 45.
- Mayer J “The concept of the right to work in international standards and the legislation of ILO member states” (1985) 124 *International Labour Review* 225.
- McClain L “Care as a public value: Linking responsibility, resources, and republicanism” (2001) 76 *Chicago-Kent Law Review* 1673.
- McCutcheon RT “Employment creation in public works – Labour-intensive construction in sub-Saharan Africa: The implications for South Africa” (1995) 19 *Habitat International* 331.
- McDonald S and Piesse J “Legacies of apartheid: The distribution of income in South Africa” (1999) 11 *Journal of International Development* 985.
- Mehta AK and Shah A “Chronic poverty in India: Incidence, causes and policies” (2003) 31 *World Development* 491.
- Melvyn P “Youth unemployment in industrialised market economy countries” (1977) 116 *International Labour Review* 23.
- Meth C and Dias R “Increases in poverty in South Africa, 1999-2002” (2004) 21 *Development Southern Africa* 59.
- Midgley J “Social security in developing countries: Integrating state and traditional systems” (1994) 22/23 *Focaal-European Journal of Anthropology* 219.
- Mouly J “Employment: A concept in need of renovation” (1977) 116 *International Labour Review* 1.
- Mouly J “Some remarks on the concepts of employment, underemployment and unemployment” (1972) 105 *International Labour Review* 155.
- Moussouris M “Skills: 10 years and the legacy continues” (2004) *Naledi Policy Bulletin* 10.
- Moussouris M “Skills development as a means of achieving employment equity” (2003) *Naledi Policy Bulletin* 5.

- Mouton P and Gruat J-V “The extension of social security to self-employed persons in Africa” (1988) 1 *International Social Security Review* 40.
- Mpedi LG “Extending social security and labour law protection to the South African informal sector – an Enquiry into recent developments in the taxi sector” (2006) 9 *Recht in Afrika* 43.
- Mutangura GB “Women and Aids in southern Africa: The case of Zimbabwe and its policy implications” (2001) 1 *Jenda: A Journal of Culture and African Women Studies* 1.
- Naidu S *et al* “Achieving the Millennium Development Goals in SADC” (2004) 7 *SADC Barometer* 5.
- Natrass N “Unemployment and Aids: The social-democratic challenge for South Africa” (2004) 21 *Development Southern Africa* 87.
- Natrass N and Seekings J “Citizenship and welfare in South Africa: Deracialisation and inequality in a labour surplus-economy” (1997) 31 *Canadian Journal of African Studies* 452.
- Norton A *et al* “Social protection: Defining the field of action and policy” (2002) 20 *Development Policy Review* 541.
- Ochel W “Hartz – Welfare to work in Germany” (2005) 2 *CESifo Dice Report* 18.
- Overseas Development Institute (ODI) “Public works as a solution to unemployment in South Africa? Two different models of public works programme compared” (2004) 2 (ODI) *Economic and Statistics Analysis Unit Briefing Paper* 5.
- Oliveira AC “Workers and other persons: Step-by-step from movement to citizenship – Case law 1995-2001” (2002) 39 *Common Market Law Review* 77.
- Olivier M “Constitutional perspectives on the enforcement of socio-economic rights: Recent South African experiences” (2002) 33 *Victoria University of Wellington Law Review* 117.
- Olivier MP and Mpedi LG “Co-ordination and integration of social security in the SADC region: Developing the Social Dimension of Economic Co-operation and Integration” (2003) 28 *Journal for Juridical Sciences* 10.

- Olivier MP and Mpedi LG “The extension of social protection to non-formal sector workers – experiences from SADC and the Caribbean” (2005) 19 *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht* (ZIAS) 144.
- Olivier MP “Towards a coherent approach to social protection, labour market policies and financing of social security: A new paradigm for South Africa” (2000) 24 *South African Journal of Labour Relations* 23.
- Osode P “The Southern African Development Community in legal historical perspective” (2003) 28 *Journal for Juridical Science* 1.
- Oucho JO and Crush J “Contra free movement: South Africa and the SADC migration Protocols” (2002) 48 *Africa Today* 139.
- Pennings F “Co-ordination of social security on the basis of the state-of-employment principle: Time for an alternative?” (2005) 42 *Common Market Law Review* 67.
- Phelps ES “Wage subsidy programmes: Alternative designs” in Snower GJ and De La Dehesa G (eds) *Unemployment Policy: Government Options for the Labour Market* (Cambridge University Press (1997)) 206.
- Phillips S “The Expanded Public Works Programme” (2004) 3 *Service Delivery Review* 20.
- Pissarides CA “Employment protection” (2001) 8 *Labour Economics* 131.
- Poku NK “Poverty, debt and Africa’s HIV/AIDS crisis” (2002) 78 *International Affairs* 531.
- Posel D “Whiteness and power in the South African civil service: Paradoxes of the apartheid state” (1999) 25 *Journal of Southern African Studies* 99.
- Ramutsindela M “Land reform in South Africa’s national parks: A catalyst for the human-nature nexus” (2003) 20 *Land Use Policy* 41.
- Ravallion M “Reaching the rural poor through public employment: Arguments, evidence and lessons from South Asia” (1991) 6 *World Bank Research Observer* 153.
- Ribas JJ “The experience of the European Economic Community in social security for migrant workers (1958-1967)” (1968) 3 *International Social Security Review* 424.
- Roberts DE “Kinship care and the price of state support for children” (2001) 76 *Chicago-Kent Law Review* 1619.

- Rubery J and Grimshaw D "ICTs and employment: The problem of job quality" (2001) 140 *International Labour Review* 165.
- Sachs A "Towards the reconstruction of South Africa" (1985) 12 *Journal of Southern African Studies* 49.
- Saget C "Poverty reduction and decent work in developing countries: Do minimum wages help?" (2001) 140 *International Labour Review* 237.
- Sarkin J "The development of the human rights culture in South Africa" (1998) 20 *Human Rights Quarterly* 628.
- Schmidt M and Mader J "Internationale Abkommen in der Sozialversicherung" (2004) 2 *Bundesarbeitsblatt* 11.
- Schnorr G "The influence of ILO standards on law and practice in the Federal Republic of Germany" (1974) 110 *International Labour Review* 539.
- Seifert A "Employment protection and employment promotion as goals of collective bargaining in the Federal Republic of Germany" (1999) 15 *International Journal of Comparative Labour Law and Industrial Relations* 343.
- Seifert A and Funken-Hötzl E "Wrongful dismissals in the Federal Republic of Germany" (2004) 25 *Comparative Labor Law and Policy Journal* 487.
- Sen A "Employment: A concept in need of renovation" (1977) 116 *International Labour Review* 45.
- Sen A "Employment, institution and technology: Some policy issues" (1975) 112 *International Labour Review* 45.
- Sen A "Inequality, unemployment and contemporary Europe" (1997) 136 *International Labour Review* 155.
- Sen A "Work and rights" (2000) 139 *International Labour Review* 119.
- Shah PS "Attitudes to polygamy in English law" (2003) 52 *International and Comparative Law Quarterly* 369.
- Shamir B "Self-esteem and the psychological impact of unemployment" (1986) 49 *Social Psychology Quarterly* 61.
- Shaw J "The interpretation of European Union citizenship" (1998) 61 *Modern Law Review* 293.

- Shipton P “Land tenure” (2001) *International Encyclopedia of the Social & Behavioral Sciences* 8256.
- Silbaugh KB “Foreword: The structures of care work” (2001) 76 *Chicago-Kent Law Review* 1389.
- Sinha P “Representing labour in India” (2004) 14 *Development in Practice* 127.
- Skovsholm K “The right to vote in South Africa – A hundred years of experience” (1999) 32 *Verfassung und Recht Übersee* 236.
- Spieker M “State benefits and the principle of subsidiarity. The crisis of the welfare state in the Federal Republic of Germany: Causes and remedies” (1985) 10 *Labour and Society* 83.
- Standing G “From People’s Security Surveys to a Decent Work Index” (2002) 141 *International Labour Review* 441.
- Steenkamp AJ “The South African Constitution of 1993 and the Bill of Rights: An evaluation in light of the international human rights norms” (1995) 17 *Human Rights Quarterly* 101.
- Stern J “The relationship between unemployment and mortality in Britain” (1983) 37 *Population Studies* 61.
- Tenney RD “Tom Green, common-law marriage, and the illegality of putative polygamy” (2002) 17 *Brigham Young University Journal of Public Law* 141.
- Theodore N and Peck J “Welfare-to-work: National problems, local solutions?” (1999) 19 *Critical Social Policy* 485.
- Ubber T “Agenda 2010: Reform of German labour law: Impact on hiring and firing staff” (2004) 5 *German Law Journal* 137.
- Unni J and Rani U “Social protection for informal workers in India: Insecurities, instruments and institutional mechanisms” (2003) 34 *Development and Change* 127.
- Van der Mei AP “Freedom of movement for the unemployed and co-ordination of unemployment benefit schemes” (2003) 5 *European Journal of Social Security* 214.
- Van Ginneken W “Extending Social Security: Policies for Developing Countries” (2003) 142 *International Labour Review* 277.
- Van Langendock J “The social protection of the unemployed” (1997) 50 *International Social Security Review* 29.

- Verschueren H “The relationship between Regulation (EEC) 1612/68 and Regulation (EEC) 1408/71 analysed through ECJ Case law on frontier workers” (2004) 6 *European Journal of Social Security* 7.
- Waas B “Temporary agency work in Germany: Reflections on recent developments” (2003) 19 *International Journal of Comparative Labour Law and Industrial Relations* 387.
- Webber AR and Taylor AP “Procedures for employee displacement: Advance notice of plant shutdown” (1963) 36 *Journal of Business* 302.
- Werle G “Without truth, no reconciliation: The South African *Rechtsstaat* and the Apartheid past” (1996) 29 *Verfassung und Recht Übersee* 58.
- Widdows K “The denunciation of international labour conventions” (1984) 33 *International and Comparative Law Quarterly* 1052.
- Williams G *et al* “Participation and power: Poor people’s engagement with India’s Employment Assurance Scheme” (2003) 34 *Development and Change* 163.
- Williams J “From difference to dominance to domesticity: Care as work, gender as tradition” (2001) 76 *Chicago-Kent Law Review* 1441.
- Willis FR “Origins and evolution of the European Communities” (1978) 440 *Annals of the American Academy of Political and Social Science (The European Community after Twenty Years)* 1.
- Yemin E “Job security: Influence of ILO standards and recent trends” (1976) 113 *International Labour Review* 17.
- Zimmerman FJ “Barriers to participation of the poor in South Africa’s land redistribution” (2000) 28 *World Development* 1439.

BOOKS

- Agarwal B “Social security and the family: Coping with seasonality and calamity in rural India” in Ahmad E *et al* (eds) *Social Security in Developing Countries* (Clarendon Press (1991)) 171.
- Ahmad E “Protecting the vulnerable: Social security and public policy” in Lipton M and Van der Gaag J (eds) *Including the Poor* (World Bank (1993)) 359.

- Ahwireng-Obeng F and Akussah G *The Impact of HIV/AIDS on African Economies* (Africa Institute of South Africa (2003)).
- Akandji-Kombé J-F “The material impact of the European Committee of Social Rights” in De Búrca G and De Witte B (eds) *Social Rights in Europe* (Oxford University Press (2005)) 89.
- Alderman H *Safety Nets and Income Transfers in South Africa* (World Bank (1999)).
- Altson P “Strengths and weaknesses of the ESC’s supervisory system” in De Búrca G and De Witte B (eds) *Social Rights in Europe* (Oxford University Press (2005)) 45.
- Anderson JG and Jensen JB “Different routes to improved employment in Europe” in Sarfati H and Bonoli G (eds) *Labour Market and Social Protection Reforms in International Perspective: Parallel or conveying tracks?* (Ashgate (2002)) 58.
- Ardington E and Lund F *Pensions and Development: The Social Security System as a Complementary Track to Programmes of Reconstruction and Development* (Centre for Social and Development Studies (1994)).
- Arndt C and Lewis JD *The Macro Implications of HIV/AIDS in South Africa: A Preliminary Assessment* (World Bank Africa Region Working Paper Series No. 9 (2000)).
- Ashiagbor D *The European Employment Strategy: Labour Market Regulation and New Governance* (Oxford (2005)) 130.
- Auer P *Employment Revival in Europe: Labour Market Success in Austria, Denmark, Ireland and the Netherlands* (International Labour Office (2000)).
- Bailey C “Extending the range of social protection” in ILO *Reflections on Reform Strategies for Social Protection in English-Speaking African Countries* (ILO (2000)) 33.
- Barrett J *Organizing in the Informal Economy: A Case Study of the Minibus Taxi Industry in South Africa* (International Labour Office (2003)).
- Bartolomei de la Cruz HG “International labour law: Renewal or decline?” in von Maydell B and Nußberger A (eds) *Social Protection by Way of International Law: Appraisal, Deficits and Further Development* (Duncker & Humblot (1996)) 19.
- Basu DD *Constitutional Law of India* (6th edition) (Prentice-Hall of India (1991)).

- Begg I and Berghman J “The future role of the EU in dealing with social exclusion: Policy perspectives” in Mayes DG *et al* (eds) *Social Exclusion and European Policy* (Edward Elgar 2001)) 306.
- Bell M “The right to equality and non-discrimination” in Hervey TK and Kenner J (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Oxford (2003)) 91.
- Bercusson B (ed) *European Labour Law and the EU Charter of Fundamental Rights – Summary Version* (European Trade Union Institute (2002)).
- Bercusson B “Freedom of assembly and of association” in Bercusson B (ed) *European Labour Law and the EU Charter of Fundamental Rights – Summary Version* (European Trade Union Institute (2002)) 25.
- Bercusson B *et al* “Legal prospects and legal effects of the EU Charter” in Bercusson B (ed) *European Labour Law and the EU Charter of Fundamental Rights – Summary Version* (European Trade Union Institute (2002)) 13.
- Bertelsmann K and Rust U *Equality in Law between Men and Women in the European Community: Germany* (Martinus Nijhoff (1995)).
- Bertranou F and Grushka CO *The Non-Contributory Pension in Argentina: Assessing the Impact on Poverty Reduction* (ILO Extension of Social Security Paper No. 5 (2002)).
- Betancur B “The present and future of work” in Acher M and Malinvaud E (eds) *The Future of Labour and Labour in the Future: Proceedings – Second Plenary Session of the Pontifical Academy of Social Sciences 20-23 March 1996* (Pontifical Academy of Social Sciences (1998)) 113.
- Betten L *International Labour Law: Selected Issues* (Kluwer (1993)).
- Betten L “The role of social partners in the Community’s social policy law-making: Participatory democracy or furthering the interests of small elites” in Engels C and Weiss M (eds) *Labour Law and Industrial Relations at the Turn of the Century* (Kluwer (1998)) 239.
- Betten L and Mac Devitt D *The Protection of Fundamental Social Rights in the European Union* (Kluwer (1996)).

- Biagi M and Salomone R “Social Europe and labour law: The role of the European Social Charter” in Blanpain R (ed) *The Council of the Europe and the Social Challenges of XXIst Century* (Kluwer (2001)) 71.
- Birk R “Human rights at the workplace and the work of the Council of Europe” in Neal AC (ed) *The Changing Face of European Labour Law and Social Policy* (Kluwer (2004)) 55.
- Birk R “The collective complaint: A new procedure in the European Social Charter” in Engels C and Weiss M (eds) *Labour Law and Industrial Relations at the Turn of the Century* (Kluwer (1998)) 261.
- Bhalla AS and Lapeyre F *Poverty and Exclusion in a Global World* (Macmillan (1999)).
- Blanpain R “The European top in Nice: An appraisal” in Blanpain R (ed) *Labour Law, Human Rights and Social Justice* (Kluwer (2001)) 121.
- Blanpain R “The European Union, employment, social policy and the law” in Blanpain R (ed) *Institutional Changes and European Social Policies after the Treaty of Amsterdam* (Kluwer (1998)) 1.
- Blanpain R (ed) *The Harmonization of Working Life and Family Life* (Kluwer (1995)).
- Blanpain R “The world of work and industrial relations in developed market economies of the XXIst century: The age of the creative portfolio worker” in Blanpain R (ed) *Non-standard Work and Industrial Relations* (Kluwer (1999)) 3.
- Blaustein SJ and Craig I *An International Review of Unemployment Insurance Schemes* (The W.E. Upjohn Institute for Employment Research (1977)).
- Blien U *et al Labour Market Policy in Germany* (IAB Labour Market Research Topics no. 49 (2002)).
- Börzel TA “Guarding the treaty: The compliance strategies of the European Commission” in Börzel TA and Cichowski RA (eds) *The State of the European Union: Law, Politics, and Society* (Oxford (2003)) 197.
- Brillat R “The Supervisory machinery of the European Social Charter: Recent developments and their impact” in De Búrca G and De Witte B (eds) *Social Rights in Europe* (Oxford University Press (2005)) 31.
- Bromberger N “Unemployment and categories of unemployment” in Voster WS (ed) *On Being Unemployed and Religious* (University of South Africa (1992)).

- Bruun N “Protection in the event of unjustified dismissal” in Bercusson B (ed) *European Labour Law and the EU Charter of Fundamental Rights – Summary Version* (European Trade Union Institute (2002)) 63.
- Burger D *South Africa Yearbook 2001/02* (Government Communication and Information System (2002)).
- Burgess J and Mitchell WF *Unemployment, Human Rights and Full Employment in Australia* (Centre of Full Employment and Equity (1998)).
- Burgess R and Stern N “Social security in developing countries: What, why, who, and how” in Ahmad E *et al* (eds) *Social Security in Developing Countries* (Claredon (1991)).
- Burtless G and Schaefer H *Earnings insurance for Germany* (Brookings Institution Policy Brief 104 (2002)).
- Byrne D and Strobl E *Defining Unemployment in Developing Countries: The Case of Trinidad and Tobago* (Centre for Research in Economic Development and International Trade (2001)).
- Cairns W *Introduction to European Union Law* (2nd ed) (Cavendish (2002)).
- Calitz K *et al* “Unemployment benefits” in Olivier MP *et al* (eds) *Social Security Law: General Principles* (Butterworths (1999)) 281.
- Cameron E *et al* *The New Labour Relations Act* (Juta) 1989)).
- Case A *Does money protect health status? Evidence from South African Pensions* (NBER Working Paper Series (2001)).
- Cawker G *Confronting Unemployment in South Africa* (Human Sciences Research Council (1993)).
- Centel T “The social security of the Turkish workers in Europe within the framework of the Association Agreement” in Jorens Y and Schulte B (eds) *European Social Security Law and Country Nationals* (Die Keure (1998)) 281.
- Chaabane M *Towards the Universalization of Social Security: The Experience of Tunisia* (ILO (2002)).
- Chen MA *et al* *Supporting Workers in the Informal Economy: A Policy Framework* (ILO (2002)).

- Church J “The black family and the law” in Bosman F (ed) *Social Welfare Law* (Lex Patria (1982)) 287.
- Clauwaert S *Fundamental Social Rights in the European Union* (European Trade Union Institute (1998)).
- Clu K and Gupta S “Social safety nets in economic reform” in Clu K and Gupta S (eds) *Social Safety Nets: Issues and Recent Experiences* (International Monetary Fund (1998)) 7.
- Closa C “Citizenship of the Union and nationality of Members States” in O’Keeffe D and Twomey PM (eds) *Legal Issues of Maastricht Treaty* (Chancery (1994)) 109.
- Colucci M “The European Social Charter and the right to information and consultation of workers. Its implementation in the European Union and in Italy” In Blanpain R (eds) *The Council of Europe and the Challenges of the XXIst Century* (Kluwer (2001)) 87.
- Collins H *Justice in Dismissal: The Law of Termination of Employment* (Clarendon Press (1992)).
- Costello C “Gender equalities and the Charter of Fundamental Rights of the European Union” Hervey TK and Kenner J (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Oxford (2003)) 111.
- Council of Europe *Vocational Training and Employment: With Special Reference to Youth Unemployment* (Council of Europe (1982)).
- Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa* (Committee of Inquiry into a Comprehensive System of Social Security for South Africa (March 2002)).
- Cooper C “Globalisation, labour law and unemployment: The South African case” in Biagi M (ed) *Job Creation and Labour Law: From Protection Towards Pro-action* (Kluwer (2000)) 233.
- Council of Europe *Social Protection in the European Social Charter* (Council of Europe Publishing (1999)).
- Cox T and Griffith A *Manual on Occupational Stress in Nursing* (International Labour Office (1994)).

- Craven MCR *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon (1995)).
- Creighton B “The future of labour law: Is there a role for the international labour standards?” in Barnard C and Deakin S (eds) *The Future of Labour Law* (Hart (2004)) 253.
- Crespo E and Pascual AS “The EU’s concept of activation for young people: Towards a new social contract?” in Pascual AS (ed) *Are Activation Policies Converging in Europe?: The European Employment Strategy for Young People* (European Trade Union Institute (2003)) 13.
- Crush J and Williams V (eds) *Counting Brain: Meaning Emigration from South Africa* (SAMP Migration Policy Brief No. 5 (2001)).
- Crush J (ed) *Losing our Minds: Skills Migration and the South African Brain Drain* (SAMP Migration Policy Series No. 18 (2000)).
- Cruz-Saco MA *Labour Markets and Social Security Coverage: The Latin American Experience* (ILO (2002)).
- Culhane B *Public Works Programs: What are the Income Gains to the Poor?* (World Bank Poverty Lines Newsletter no. 9 (1997)).
- Currie I and De Waal J *The Bill of Rights Handbook* (5th ed) (Juta (2005)).
- Dasgupta S *Employment Security: Conceptual and Statistical Issues* (International Labour Office (2001)).
- Dasgupta S *Organizing for Socio-Economic Security in India* (ILO (2002)).
- Datt G and Ravallion M *Income Gains for the Poor from Public Works Employment: Evidence from two Indian Villages* (World Bank Living Standards Measurement Study Working Paper 100 (1994)).
- Davies C *Family Law in Canada* (Carswell (1984)).
- Davis D “Dignity” in Davis D *et al* (eds) *Fundamental Rights in the Constitution: Commentary and Cases* (Juta (1997)) 70.
- Dejardin AK *Public Works Programmes, a Strategy for Poverty Alleviation: The Gender Dimension* (Issues in Development Discussion Paper 10 (1996)).
- Dekker AH and Olivier MP “Informal social security” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 559.

- Department of Finance 2003 *Intergovernmental Fiscal Review* (Department of Finance (2003)).
- Devereux S 'Making Less Last Longer': *Informal Safety Nets in Malawi* (Institute of Development Studies Discussion Paper 373 (1999)).
- De Búrca G and De Witte B *Social Rights in Europe* (Oxford University Press (2005)).
- De Villiers B *Land Reform: Issues and Challenges – A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia* (Konrad-Adenauer Stiftung (2003)).
- De Witte B "The trajectory of fundamental social rights in the European Union" in De Búrca G and De Witte B (eds) *Social Rights in Europe* (Oxford (2005)) 152.
- Development Policy Research Unit (DPRU) *Human Development Indicators in the SADC Region* (DPRU Policy Brief No. 01/P13 (2001)).
- Donati P "The changing meaning of work (secularised vs humanistic) and its implications for the new society" in Archer MS (ed) *Towards Reducing Unemployment: The Proceedings of the Fifth Plenary Session of the Pontifical Academy of Social Sciences 3-6 March 1999* (Pontifical Academy of Social Sciences (1999)) 287.
- Drewicki K "The right to work and rights in work" in Eide A *et al* (eds) *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff (1995)) 169.
- Duflo E *Grandmothers and Granddaughters: Old Age and Intra-Household Allocation in South Africa* (NBER Working Paper Series (2000)).
- Dupper OC "Maternity" in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 399.
- Durán-Valverde F *Anti-poverty Programme in Costa Rica: The Non-Contributory Pension Scheme* (ILO Extension of Social Security Paper No. 8 (2002)).
- Economist Intelligence Unit *India: Country Profiles 2003* (Economist Intelligence Unit (2003)).
- Eichenhofer E "Social security reform and the law" in Pieters D (ed) *Confidence and Changes: Managing Social Protection in the New Millennium* (Kluwer (2001)) 237.
- Engels C and Salas L "Labour law and the European Union after the Amsterdam Treaty" in Blanpain R (ed) *Institutional Changes and European Social Policies after the Treaty of Amsterdam* (Kluwer (1998)).

- Esping-Andersen G “Towards the good society, once again?” in International Social Security Association 4th *International Research Conference on Social Security “Social Security in a Long Life Society”* (Antwerp, Belgium, 5-7 May 2002) – *Conference Volume* (International Social Security Association (2003)) 5.
- European Commission *European Employment Observatory Review: Spring 2003* (European Commission (2003)).
- Evju S “The European Social Charter” in Blanpain R (ed) *The Council of the Europe and the Social Challenges of the XXIst Century* (Kluwer (2001)) 19.
- Falkner G *et al* *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge (2005)).
- Federal Ministry of Labour and Social Affairs *Social Security at a Glance* (Federal Ministry of Labour and Social Affairs (2000)).
- Federal Republic of Germany *National Action Plan of Employment Policy 2003* (Federal Republic of Germany (2003)).
- Federal Republic of Germany *National Action Plan for Employment Policy 2004* (Federal Republic of Germany (2004)).
- Feist H and Schöb R *Workfare in Germany and the Problem of Vertical Fiscal Externalities* (CESifo Working Paper 185 (1999)).
- Fenwick C and Kalula E *Law and Labour Law Market Regulation in East Asia and Southern Africa: Comparative Perspectives* (Centre for Employment and Labour Relations Law Working Paper No. 30 (2004)).
- Fluitman F *Working, but not well: Notes on the Nature and Extent of Employment Problems in Sub-Saharan Africa* (International Training Centre of the International Labour Organisation (2001)).
- Freiberg-Strauss J *Social Security for the Poor – Options and Experiences* (Deutsche Gesellschaft für Technische Zusammenarbeit (1999)) 3.
- Gacon-Estrada H “The Cooperation Agreement concluded between the European Community and the Maghreb Countries (Algeria, Morocco and Tunisia)” in Jorens Y and Schulte B (eds) *European Social Security Law and Country Nationals* (Die Keure (1998)) 323.

- Gender, Poverty and Employment (GPE) Regional Brief – Southern Africa *Access to Assets* (ILO (2003)).
- Gender, Poverty and Employment (GPE) Regional Brief – Southern Africa *Gender, Poverty and Employment: Issues, Trends and Approaches* (ILO (2003)).
- Gender, Poverty and Employment (GPE) Regional Brief – Southern Africa *Skills Development and Poverty Reduction* (ILO (2003)).
- Gender, Poverty and Employment (GPE) Regional Brief – Southern Africa *Women in Wage Employment* (ILO (2003)).
- Ghai D *Decent Work: Concepts, Models and Indicators* (International Institute for Labour Studies Discussion Paper 139/2002 (2002)).
- Glendon MA “The right to work and the limits of law” in Archer M and Malinvaud E (eds) *The Right to Work: Towards Full Employment* (Pontifical Academy of Social Sciences (1998)) 103.
- Gomien D *et al Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing (1996)).
- Gore C and Figueiredo JB (eds) *Social Exclusion and Anti-poverty Policy: A Debate* (International Institute for Labour Studies (1997)).
- Gori G “Domestic enforcement of the European Social Charter: The way forward” in De Búrca G and De Witte B (eds) *Social Rights in Europe* (Oxford University Press (2005)) 69.
- Götz V “Legislative and executive power under the constitutional requirements entailed in the principle of the rule of law” in Starck C (ed) *New Challenges to the German Basic Law* (Nomos (1991)) 141.
- Grogan J *Dismissal* (Juta (2002)).
- Grogan J *Workplace Law* (8th ed) (Juta 2005)).
- Gual J “The employment debate: Employment performance and institutional change” in Gual J (ed) *Job Creation: The Role of Labor Market Institutions* (Edward Elgar (1998)) 1.
- Guibentif P and Bouget D *Minimum Income Policies in the European Union* (European Commission (1997)).

- Güzel A “Der Einfluss der internationalen und supranationalen Normen auf dem Gebiet des Arbeits- und Sozialrechts” in Ekonomi M *et al* (eds) *Der Einfluss internationalen Rechts auf das türkische und das deutsche Arbeits- und Sozialrecht* (Nomos (2003)) 17.
- Haacker M *The Economic Consequences of HIV/AIDS in Southern Africa* (IMF Working Paper WP/02/38 (2002)).
- Hagen KA *The International Labour Organization: Can it deliver the Social Dimension of Globalization?* (Friedrich Ebert Stiftung (2003)).
- Hailbronner K and Kau M “Constitutional Law” in Zekoll J and Reimann M (eds) *Introduction to German Law* (2nd edition) (Kluwer (2005)) 53.
- Harris D *The European Social Charter* (University Press of Virginia (1984)).
- Hauser R “‘The Universal Basic Income’: Its Contribution to Reducing Unemployment and its Relationship to Catholic Social Teaching on the ‘Family Wage’” in Archer MS (ed) *Towards Reducing Unemployment: The Proceedings of the Fifth Plenary Session of the Pontifical Academy of Social Sciences 3-6 March 1999* (Pontifical Academy of Social Sciences 1999) 143.
- Hellsten K “Access to social protection. Citizenship, Work, Residence” in Langer R and Sakslin M (eds) *Co-ordinating Work-based and Residence-based Social Security* (University of Helsinki (2004)) 21.
- Hendrickx F “Fundamental rights in the EU” in Blanpain R (ed) *Institutional Changes and European Social Policies after the Treaty of Amsterdam* (Kluwer (1998)) 157.
- Hervey TK and Kenner J (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Oxford (2003)).
- Heyns C (ed) *Human Rights Law in Africa* (Vol. 2) (Martinus Nijhoff (2004)).
- Hidayatullah M (ed) *Constitutional Law of India (Volume 1)* (Arnold-Heinemann (1984)).
- Hilf M “General problems of relations between constitutional law and international law” in Starck C (ed) *Rights, Institutions and Impact of International Law according to the German Basic Law* (Nomos (1987)) 177.
- Hirway I and Terhal P *Towards Employment Guarantee in India: Indian and International Experiences in Rural Public Works Programmes* (Sage (1994)).

- Hodges-Aeberhard J “Affirmative action in employment: Recent court approaches to a difficult concept” in Loufti MF (ed) *Women, Gender and Work: What is Equality and How Do We Get There?* (ILO (2001)) 441.
- Hohnerlein EM “Der Einfluss des internationalen und supranationalen Rechts auf das deutsche Sozialrecht” in Ekonomi M *et al* (eds) *Der Einfluss internationalen Rechts auf das türkische und das deutsche Arbeits- und Sozialrecht* (Nomos (2003)) 85.
- Humblet M and Silva R *Standards for the XXIst Century: Social Security* (ILO (2002)).
- ILO *Decent Work* (International Labour Conference 87th Session 1999).
- ILO *Decent Work* (ILO (1999)).
- ILO *Decent Work and the Informal Economy: Abstracts of Working Papers* (ILO (2002)).
- ILO *Employment Promotion and Social Security* (ILO (1986)).
- ILO *Equality of Treatment (Social Security): General Survey by the Committee of Experts on the Application of Conventions and Recommendations* (ILO (1977)).
- ILO *HIV/AIDS: A Threat to Decent Work, Productivity and Development* (ILO (2000)).
- ILO *Into the Twenty-First Century: The Development of Social Security* (ILO (1984)).
- ILO *Promoting Employment: Policies, Skills, Enterprises* (ILO (2004)).
- ILO *Social Security: Issues, Challenges and Prospects* (ILO (2001)).
- ILO *Social Security for Migrant Workers* (ILO (1977)).
- ILO *Social Security for the Unemployed* (ILO (1976)).
- ILO *Social Security Principles* (ILO (1998)).
- ILO *Termination of Employment Digest* (ILO (2000)).
- ILO *Unemployment Insurance Schemes* (ILO (1955)).
- ILO *Women and Men in the Informal Economy: A Statistical Picture* (International Labour Office (2002)).
- ILO *Women Organizing for Social Protection: The Self-Employed Women’s Association’s Integrated Insurance Scheme, India* (International Labour Office (2001)).
- ILO *World Labour Report 2000: Income Security and Social Protection in a Changing World* (ILO (2000)).
- ILO *Working Out of Poverty* (International Labour Office (2003)).

- ILO *World Employment Report 1998-1999* (International Labour Office (1998)).
- ILO *World Employment Report 2001: Life at Work in the Information Economy* (International Labour Office (2001)).
- ILO *Vocational Rehabilitation and Employment of Disabled Persons* (International Labour Office (1998)).
- Jackson DW “Affirmative action in comparative perspectives: India and the United States” in Loenen T and Rodrigues PR (eds) *Non-Discrimination Law: Comparative Perspectives* (Kluwer (1999)) 249.
- Jain S “Basic social security in India” in Van Ginneken W (ed) *Social Security for the Excluded Majority: Case Studies of Developing Countries* (International Labour Office (1999)) 37.
- Jaspers A. Ph. C.M and Betten L (eds) *25 Years: European Social Charter* (Kluwer (1988)).
- Jauch H *Structural Adjustment Programmes: Their Origin and International Experiences* (Labour Resource and Research Institute (Namibia) (1999)).
- Jorens Y and Schulte B (eds) *European Social Security Law and Country Nationals* (Die Keure (1998)).
- Junukar PN “Long-term unemployment in Australia: Problems of memory and measurement” in Verhaar CHA *et al* (eds) *On the Mysteries of Unemployment: Causes, Consequences and Policies* (Kluwer (1992)).
- Justino P *Social Security in Developing Countries: Myth or Necessity? – Evidence from India* (PRUS Working Paper No. 20 (2003)).
- Kalula E “Beyond borrowing and bending: Labour market regulation and the future of labour law in Southern Africa” in Barnard C *et al* (eds) *The Future of Labour Law* (Hart (2004)).
- Kanyenze G *et al* *Strategies to Combat Youth Unemployment and Marginalisation in Anglophone Africa* (International Labour Organization/SAMAT (2000)).
- Karpen U “Rule of law” in Karpen U (ed) *The Constitution of the Federal Republic of Germany: Essays on the Basic Rights and Principles of the Basic Law with a Translation of the Basic Law* (Nomos (1988)) 169.

- Kaseke E “Informal social security in eastern and southern Africa” in *Towards the Development of Social Protection in the SADC Region* (Proceedings and Outcomes of a Conference Held at the Helderfontein Conference Centre, Johannesburg, South Africa, 17-19 October 2001 (2002)) 245.
- Kaseke E “Social protection in SADC: Developing an integrated and inclusive framework – A social policy perspective” in Olivier MP and Kalula ER *Social Protection in SADC: Developing and Integrated and Inclusive Framework* (Centre for International and Comparative Labour and Social Security Law (CICLASS) and Institute of development and Labour Law (2004)) 1.
- Kemmerling A and Bruttel O *New Politics in German Labour Market Policy?: The Implications of the Recent Hartz Reforms for the German Welfare State* (Wissenschaftszentrum Berlin für Sozialforschung (2005)).
- Kieselbach T (ed) *Youth Unemployment and Social Exclusion: A Comparison of Six European Countries* (Leske + Budrich (2000)).
- Kildal N *Welfare Tendencies in Scandinavian Welfare Policies* (International Labour Office (2001)).
- Klein E “The concept of the Basic Law” in Starck C (ed) *Main Principles of the German Basic Law* (Nomos (1983)) 15.
- Knuth M “‘How long does it take to turn around a tanker?’ – Worker displacement and preventative labour market policy in Germany” in Klemmer P and Wink R (eds) *Preventing Unemployment in Europe: A New Framework for Labour Market Policy* (Edward Elgar (2000)) 65.
- Kraak A “Training policies under late apartheid: The historical imprint of a low skills regime” in McGrath S *et al* (eds) *Shifting Understandings of Skills in South Africa: Overcoming the Historical Imprint of a Low Skills Regime* (HRSC Press (2004)) 46.
- Kraus F *et al* *Do Public Works Programmes Work?: Some Unpleasant Results from the East German Experience* (ZEW Discussion Paper no. 98-7 (1998)).
- Kucera D “Decent work and rights of work: New measures of freedom of association and collective bargaining” in Blanpain R and Engels C (eds) *The ILO and the Social Challenges of the 21st century: The Geneva Lectures* (Kluwer (2001)) 125.

- Kulke U “Overview of up-to-date ILO social security conventions” in Pennings F (ed) *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer (2006)) 27.
- Kunig P *Das Rechtsstaatsprinzip* (J.C.B. Mohr (1986)).
- Land Claims Commission *Land Restitution in South Africa: Our Achievements and Challenges* (Land Claims Commission (2003)).
- Lang H “Soziale Grundrechte in der Charta der Grundrechte der Europäischen Union” in Stern K and Tettinger PJ (eds) *Die Europäische Grundrechte-Charta im wertenden Verfassungsvergleich* (Berliner Wissenschafts-Verlag (2005)) 305.
- Liffmann R “Social security as a constitutional imperative: An analysis and comparative perspective with emphasis on the effect of globalization on marginalisation” in Olivier MP *et al* (eds) *The Extension of Social Security Protection in South Africa: A Legal Inquiry* (Siber Ink (2001)) 29.
- Lohse T *Hartz IV – The German “Word of the Year 2004” and the Country’s Hope to overcome its Problem of Unemployment* (Diskussionspapiere der Wirtschaftswissenschaftlichen Fakultät der Universität Hannover No. 311 (2005)).
- Lund F and Srinivas S *Learning for Experience: A Gendered Approach to Social Protection for Workers in the Informal Economy* (ILO (2000)).
- Lyon D “The changing meaning and value of work in a globalized information society” in Archer MS (ed) *Towards Reducing Unemployment: The Proceedings of the Fifth Plenary Session of the Pontifical Academy of Social Sciences 3-6 March 1999* (Pontifical Academy of Social Sciences (1999)) 269.
- Madembo RC “The role of savings and credit schemes in meeting the social security needs of communal farmers” in Kaseke E (ed) *Social Security Systems in Rural Zimbabwe* (Friedrich Ebert Stiftung (1997)).
- Makino K *Social Security Policy Reform in Post-Apartheid South Africa: A Focus on the Basic Income* (Grant Centre for Civil Society (2004)).
- Malhortra R and Kabeer N *Demographic Transition, Inter-generational Contracts and Old Age Security: An Emerging Challenge for Social Policy in Developing Countries* (Institute of Development Studies (2002)).

- Mangum S *et al* *Strategies for Creating Transitional Jobs during Structural Adjustment* (World Bank Policy Research Working Paper WPS 947 (1992)).
- Marcus T *et al* *Down to Earth: Land Demand in the New South Africa* (University of Natal Indicator Press (1996)).
- Matlárý JH “Women and work: The radical papal teaching” in Acher M and Malinvaud E (eds) *The Future of Labour and Labour in the Future: Proceedings – Second Plenary Session of the Pontifical Academy of Social Sciences 20-23 March 1996* (Pontifical Academy of Social Sciences (1998)) 263.
- May J (ed) *Poverty and Inequality in South Africa: Report Prepared for the Office of the Executive Deputy President and the Inter-Ministerial Committee for Poverty and Inequality* (1998).
- McDonald C *et al* *Income Distribution, Informal Safety Nets, and Social Expenditures in Uganda* (International Monetary Fund Working Paper (1996)).
- McGrath S “Skills development for enterprise development: A major challenge for ‘joined-up’ policy” in McGrath S *et al* (eds) *Shifting Understandings of Skills in South Africa: Overcoming the Historical Imprint of a Low Skills Regime* (HRSC Press (2004)) 194.
- McKendrick B and Dudas E “South Africa” in Dixon J (ed) *Social Welfare in Africa* (Croom Helm (1987)) 184.
- Mengelkoch S *The Right to Work in SADC Countries: Towards Free Movement of Labour in Southern Africa* (Nomos (2000)).
- Meulders D “Innovative employment initiatives and equal opportunities” in Marin B *et al* (eds) *Innovative Employment Initiatives* (Ashgate (2000)) 349.
- Meyer J *et al* *Assessing the South African Brain Drain: A Statistical Comparison* (DPRU Working Paper No. 00/40 (2000)).
- Mincer J *Education and Unemployment* (NBER Working Paper No. 3838 (1991)).
- Mitchell AG *Strategic Training Partnerships between the State and Enterprise* (International Labour Office (1998)).
- Mpedi LG *et al* “Welfare and legal aid” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 197.

- Morduch J and Sharma M *Strengthening Public Safety Nets from the Bottom up* (World Bank Institute (2002)).
- Morgan R “Social security in the SADCC states of southern Africa: Social-welfare programmes and the reduction of household vulnerability” in Ahmad E *et al* (eds) *Social Security in Developing Countries* (Clarendon (1991)) 415.
- Mutangadura G *et al* *A Review of Household and Community Responses to the HIV/AIDS Epidemic in the Rural Areas of Sub-Saharan Africa* (UNAIDS (1999)).
- Mutual Information System on Social Protection (MISSOC) *Social Protection in the Member States of the European Union, of the European Economic Area and in Switzerland – Situation on 1 May 2004* (European Commission (2005)).
- Nagel SG “Council of Europe” in Van Eeckhoutte W (ed) *Social Security Law* (Kluwer (2000)) 68.
- Naidu S and Roberts B *Confronting the Region: A Profile of Southern Africa* (Human Science Research Council (2004)).
- Nathan C “Maintenance and the maintenance courts” in Bosman F (ed) *Social Welfare Law* (Lex Patria (1982)) 243.
- National Treasury (South Africa) *Budget Review 2004* (Government Printers (2004)) 135.
- Nayyar R *The Contribution of Public Works and Other Labour-Based Infrastructure to Poverty Alleviation: The Indian Experience* (ILO Issues in Employment and Poverty Discussion Paper No. 3 (2002)).
- Nickless J and Siedl H *Co-ordination of Social Security in the Council of Europe: Short Guide* (Council of Europe Publishing (2004)).
- Nowak M “The right to education” in Eide A *et al* (eds) *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff (1995)).
- Nußberger A “Die Wirkungsweise internationaler und supranationaler Normen in Bereich des Arbeit- und Sozialrechts” in Ekonomi M *et al* (eds) *Der Einfluss internationalen Rechts auf das türkische und das deutsche Arbeits- und Sozialrecht* (Nomos (2003)) 43.
- Nußberger A “Sozialstandards in der Charta der Grundrechte der Union” in Stern K and Tettinger PJ (eds) *Die Europäische Grundrechte-Charta im wertenden Verfassungsvergleich* (Berliner Wissenschafts-Verlag (2005)) 323.

- Oates S “International labour standards: The challenge of the 21st century” in Blanpain R and Engels C (eds) *The ILO and the Social Challenges of the 21st Century: The Geneva Lectures* (Kluwer (2001)) 93.
- Olivier MP “Death and survivor’s benefits” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 301.
- Olivier MP *et al* “Constitutional issues” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 49.
- Olivier MP and Kalula ER “Regional social security” in Olivier MP *et al* (eds) *Introduction to Social Security* (LexisNexis/Butterworths (2004)) 183.
- Olivier MP and Kalula ER “Scope of coverage” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (Lexisnexus/Butterworths (2003)) 123.
- Olivier MP “Labour relations in the public service” *LAWSA Vol 13: Labour Law* (Butterworths (2001)).
- Olivier MP and Smit N *LAWSA Vol 13 (Part 2): Labour Law and Social Security Law* (Butterworths (2002)).
- Olivier MP and Van Kerken E “Unemployment insurance” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415.
- Olivier M “Regional social security: Are innovative developments in Southern Africa relevant to the European Context?” in Pieters D (ed) *European Social Security and Global Politics* (Kluwer (2003)) 95.
- Olivier M “Social security in SADC: An integrated and inclusive framework – A rights-based perspective” in Olivier MP and Kalula ER (eds) *Social Protection in SADC: Developing an Integrated and Inclusive Framework* (Centre for International and Comparative Labour and Social Security Law (CICLASS) and Institute of Development and Labour Law (2004)) 21.
- Olivier M “Social security for migrants: Does the European Union framework provide lessons for development in SADC?” in Berghman J *et al* (eds) *Social Security in Transition* (Kluwer (2002)) 107.
- Orr K “From education to employment: The experience of young people in the European Union” in Groth C and Maenning W (eds) *Strategies Against Youth Unemployment: An International Comparison* (Peter Lang (2001)) 147.

- Osieke E *Constitutional Law and Practice in the International Labour Organisation* Martinus Nijhoff (1985)).
- O'Higgins N *The Challenge of Youth Unemployment* (ILO (1997)).
- O'Higgins N *Youth Unemployment and Employment Policy: A Global Perspective* (International Labour Office (2001)).
- O'Keeffe D "Union citizenship" in O'Keeffe D and PM Twomey (eds) *Legal Issues of Maastricht Treaty* (Chancery (1994)) 87.
- Parissotto A "Economic globalisation and the demand for decent work" in Blanpain R and Engels C (eds) *The ILO and the Social Challenges of the 21st Century: The Geneva Lectures* (Kluwer (2001)) 1.
- Peace R "Social exclusion: A concept in need of definition" (2001) 16 *Social Policy Journal of New Zealand* 17.
- Pennings F (ed) *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer (2006)).
- Pennings F "Inclusion and exclusion of persons and benefits in the new co-ordination regulation" in Spaventa E and Dougan M (eds) *Social Welfare and EU Law* (Hart (2005)) 241.
- Pennings F *Introduction to European Social Security Law* (4th ed) (Intersentia (2003)).
- Plath H *Work Requirements in Transformation, Competence for the Future: A Critical Look at the Consequences of Current Positions* (IAB Labour Market Research Topics No. 45 (2001)).
- Platteau J-P "Traditional systems of social security and hunger insurance: Past achievements and modern challenges" in Ahmad E *et al* (eds) *Social Security in Developing Countries* (Claredon (1991)) 112.
- Prabhu KS *Socio-Economic Security in the Context of Pervasive Poverty: A Case Study of India* (ILO (2001)).
- Raffe D "The role of vocational training and education in the combat against youth unemployment" in Groth C and Maenning W (eds) *Strategies Against Youth Unemployment: An International Comparison* (Peter Lang (2001)) 91.
- Raga Gil TR "A new shape for the welfare state" in Malinvaud E (ed) *Intergenerational Solidarity* (Pontifical Academy of Social Sciences (2002)) 210.

- Ravallion M *et al* *Higher Wages for Relief Work Can Make Many of the Poor Worse Off: Evidence from Maharashtra's Employment Guarantee Scheme* (World Bank Policy Research Working Paper WPS 568 (1991)).
- Ravallion M *Reaching the Poor through Rural Public Employment: A Survey of Theory and Evidence* (World Bank Discussion Papers 94 (1990)).
- Raworth P *Introduction to the Legal System of the European Union* (Oceana (2001)).
- Redja GE *Social Insurance and Economic Security* (Englewood Cliffs (1994)).
- Renga S "The role of the Italian social security system for the unemployed in the labour market: in Biagi M (ed) *Job Creation and Labour Law* (Kluwer (2000)) 195.
- Reynaud E *The Extension of Social Security Coverage: The Approach of the International Labour Office* (ILO (2002)).
- Reyneri E "Ways and means of integrating the young unskilled into work" in Archer MS (ed) *Towards Reducing Unemployment: The Proceedings of the Fifth Plenary Session of the Pontifical Academy of Social Sciences 3-6 March 1999* (Pontifical Academy of Social Sciences 1999) 167.
- Riedel EH "Assertion and protection of human rights in international treaties and their impact in the Basic Law" in Starck C (ed) *Rights, Institutions and Impact of International Law according to the German Basic Law* (Nomos (1987)) 197.
- Richards P *Towards the Goal of Full Employment: Trends, Obstacles and Policies* (International Labour Office (2001)).
- Ringen S "Social security, social reform and social assistance" in Pieters D (ed) *Social Protection for the Next Generation in Europe* (Kluwer (1998)) 27.
- Rodgers G "The design of policy against exclusion" in Rodgers G *et al* (eds) *Social Exclusion: Rhetoric, Reality, Responses* (International Institute for Labour Studies (1995)) 253.
- Rood M "New developments within the ILO supervisory system" in Blanpain R (ed) *Labour Law, Human Right and Social Justice* (Kluwer (2001)) 87.
- Ryan B "The Charter and collective labour law" in Hervey TK and Kenner J (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Oxford (2003)) 67.
- Saini DB "India" in Van Eeckhoutte W (ed) *Social Security Law* (Kluwer (2001)).

- Saini DS “Labour organization and labour relations in India: Implications for poverty alleviation” in Williams L *et al* (eds) *Law and Poverty: The Legal System and Poverty Reduction* (Zed (2003)) 269.
- Sankaran TS “Social assistance: Evidence and policy issues” in Van Ginneken W (ed) *Social Security for All Indians* (Oxford University Press (1998)) 57.
- Samson M *et al* *Research Review on Social Security Reform and the Basic Income Grant for South Africa* (ILO and EPRI (2002)).
- Sarfati H “Labour market and social protection policies: Linkages and interactions” in Sarfati H and Bonoli G (eds) *Labour Market and Social Protection Reforms in International Perspective: Parallel or Converging tracks?* (Ashgate (2002)) 11.
- Schleberger E *Namibia’s Universal Pension Scheme: Trends and Challenges* (ILO Extension of Social Security Paper No. 6 (2002)).
- Schlyter C *International Labour Standards and the Informal Sector: Developments and Dilemmas* (ILO Employment Sector (2002/3)).
- Schmid J “Germany” in Joos PA *et al* (eds) *Social Security and Solidarity in the European Union: Facts, Evaluations and Perspectives* (Physica (2000)) 65.
- Schömann K *et al* *Moving towards Employment Insurance – Unemployment Insurance and Employment Protection in the OECD* (Discussion Paper no. FS I 00-201 Wissenschaftszentrum Berlin für Sozialforschung (2000)).
- Schröder L “Unemployment among young people with a foreign background: The potential of active labour market programmes” in Groth C and Maenning W (eds) *Strategies Against Youth Unemployment: An International Comparison* (Peter Lang (2001)) 61.
- Schulte B “Der ‘acquis communautaire’ im Arbeits- und Sozialrecht: Der Stand des Europäischen Arbeits- und Sozialrechts” in Ekonomi M *et al* (eds) *Der Einfluss internationalen Rechts auf das türkische und das deutsche Arbeits- und Sozialrecht* (Nomos (2003)) 139.
- Schulte B “Implementation of regulation 1408/71 – preparations by new member States” in Department of Social and Family Affairs, Ireland *Co-ordination of Social Security in an Enlarged Europe – Now and Tomorrow* (Department of Social and Family Affairs (2004)) 18.

- Schulte B “The impact of social security conventions: Germany” in Pennings F (ed) *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer (2006)) 115.
- Schwarzer H and Querino AC *Non-Contributory Pensions in Brazil: The Impact on Poverty Reduction* (ILO Extension of Social Security Paper No. 11 (2002)).
- Servais J “The future of work and related security: A discussion of the need to place matters in perspective” in Blanpain R and Engels C (eds) *The ILO and the Social Challenges of the 21st Century: The Geneva Lectures* (Kluwer (2001)) 11.
- Siebert H *How can Europe Solve its Unemployment Problem?* (Kiel Discussion Papers no. 342 (1999)).
- Siedentopf H “The principle of the rule of law” in Siedentopf H *et al* (eds) *The Rule of Law in Public Administration: The German Approach* (Hochschule für Verwaltungswissenschaften Speyer (1993)) 3.
- Silver H “Reconceptualizing social disadvantage: Three paradigms of social exclusion” in Rodgers G *et al* (eds) *Social Exclusion: Rhetoric, Reality, Responses* (International Institute for Labour Studies (1995)) 58.
- Snowder DJ “The simple economics of benefit transfers” in Snowder DJ and De La Dehesa G (eds) *Unemployment Policy: Government Options for the Labour Market* (Cambridge (1997)) 163.
- Standing G *Globalisation and Flexibility: Dancing Around Pensions* (International Labour Office (2000)).
- Standing G *et al Restructuring the Labour Market: The South African Challenge* (International Labour Office (1996)).
- Standing G *Unemployment and Income Security* (International Labour Organisation (2000)).
- Starrin M *et al* “Comparative report” in Kieselbach T (ed) *Youth Unemployment and Social Exclusion: A Comparison of Six European Countries* (Leske + Budrich (2000)) 15.
- Statistics South Africa (*Labour Force Survey: March 2005* (Statistics South Africa (2005)).

- Statistics South Africa *Labour Force Survey: September 2005* (Statistics South Africa (2005)).
- Stergiou A “The protection of fundamental social rights within the European Union” in Sakellaropoulos T and Berghman J (eds) *Connecting Welfare Diversity within the European Social Model* (Intersentia (2004)) 189.
- Stock E and De Veen J *Expanding Labor-Based Methods for Road Works in Africa* (World Bank Technical Paper no. WTP 347 (1996)).
- Streak J and Van der Westhuizen C *Fitting the Pieces Together: A Composite View of Government’s Strategy to Assist the Unemployed in South Africa 1994-2004* (IDASA (2004)).
- Subarro K *Namibia’s Social Safety Net: Issues and Options for Reform* (Policy Research Working Paper (1996)).
- Subbayamma G “Social security for women in the informal sector” in Social Security Association of India *Social Security for Women* (Friedrich Ebert Stiftung (1994)) 80.
- Sugeno K and Suwa Y “Technological innovation and social protection: ‘Career is property’ as a concept of labour market policies” in Engels C and Weiss M (eds) *Labour Law and Industrial Relations at the Turn of the Century* (Kluwer (1998)) 91.
- Tomaševski K *Free and Compulsory Education for All Children: The Gap between Promise and Performance* (Right to Education Primers No. 2 (2001)).
- Tomaševski K *Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable* (Right to Education Primers No. 3 (2001)).
- Tomaševski K *Removing Obstacles in the Way to the Rights to Education* (Right to Education Primers No. 1 (2001)).
- Tomes I “The viewpoint of national states – Czech republic” in Jorens Y (ed) *The Influence of International Organization on National Social Security Law in the European Union: The Example of Old-age Pension* (Nomos (2002)) 73.
- Tripp AM *Non-formal Institutions, Informal Economies, and the Politics of Inclusion* (WIDER Discussion Paper no. 2001/108 (2001)).
- Tschentscher A *The Basic Law (Grundgesetz): The Constitution of the Federal Republic of Germany (May 23rd, 1949)* (Jurisprudencia (2003)).
- Tzannatos Z and Roddis S *Unemployment Benefits* (World Bank (1998)).

- Thurlow J *Can South Africa Afford to Become Africa's First Welfare State?* (International Food Policy Research Institute (2002)).
- UNICEF *Children Orphaned by AIDS: Front-line Responses from Eastern and Southern Africa* (UNICEF (1999)).
- United Nations Development Programme *Human Development Report 2004: Cultural Liberty in Today's Diverse World* (United Nations Development Programme (2004)).
- United Nations *Enhancing Social Protection and Reducing Vulnerability in a Globalising World: Report of the Secretary-General* (39th Session of the Commission for Social Development (2000)).
- Unni J and Rani U *Insecurities of Informal Workers in Gujarat, India* (ILO (2002)).
- Valticos N and von Potobsky G *International Labour Law* (Kluwer (1995)).
- Van Aerschot P "Activation policies and legal safeguards: The case of Finland" in Pieters D (ed) *Confidence and Changes: Managing Social Protection in the New Millennium* (Kluwer (2001)) 27.
- Van der Horst ST *Native Labour in South Africa* (Frank Cass (1971)).
- Van der Veen R and Groot L (eds) *Basic Income on the Agenda: Policy Objectives and Political Chances* (Amsterdam University Press (2000)).
- Van Ginneken W *Extending Social Security: Policies for Developing Countries* (ILO Extension of Social Security Paper No. 13 (2003)).
- Van Ginneken W (ed) *Social Security for the Excluded Majority: Case Studies of Developing Countries* (ILO (1999)).
- Van Ginneken W *Social Security for the Informal Sector: Issues, Options and Tasks Ahead* (ILO (1996)).
- Van Ginneken W "Overcoming social exclusion" in Van Ginneken W (ed) *Social Security for the Excluded Majority: Case Studies of Developing Countries* (ILO (1999)) 1.
- Van Kerken ET and Olivier MP "Unemployment insurance" in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (LexisNexis/Butterworths (2003)) 415.
- Van Langendonck J "From unemployment to labour market insurance" in Pieters D (ed) *Confidence and Changes: Managing Social Protection in the New Millennium* (Kluwer (2001)) 193.

- Van Langendonck J “The right to social security and allied rights” in Ruland F *et al* (eds) *Verfassung, Theorie und Praxis des Sozialstaats* (C.F. Müller (1998)) 477.
- Van Parijs P (ed) *Arguing for Basic Income: Ethical Foundations for a Radical Reform* (Verso (1992)).
- Van Peijpe T *Employment Protection under Strain* (Kluwer (1998)).
- Van Zyl J *et al* “Introduction” in Van Zyl J *et al* *Agricultural Land Reform in South Africa* (Oxford University Press (1996)).
- Venter F *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States* (Juta/Kluwer (2000)).
- Viaene J *et al* “Prevention and related policy issues” in Berghman J and Cantillon B (eds) *The European face of Social Security* (Avebury (1993)) 281.
- Vigneau C “Freedom to choose an occupation and right to engage in work” in Bercusson B (ed) *European Labour Law and the EU Charter of Fundamental Rights – Summary Version* (European Trade Union Institute (2002)) 29.
- Voges W *et al* “Uneven development – local authorities and workfare in Germany” in Lødemel I and Trickey H (eds) *‘An Offer You Can’t Refuse’: Workfare in International Perspective* (The Policy Press (2000)) 71.
- Von Benda-Beckmann F *et al* (eds) *Between Kinship and the State: Social Security and Law in Developing Countries* (Foris (1988)).
- Von Benda-Beckmann F *et al* “Indigenous support and social security: Lessons from Kenya” in Midgley J and Sherraden M (eds) *Alternatives to Social Security: An International Inquiry* (Auburn House (1997)) 105.
- Von Braun J “Social security in sub-Saharan Africa: Reflections on policy challenges” in Ahmad E *et al* (eds) *Social Security in Developing Countries* (Claredon (1991)) 395.
- Von Maydell B *et al* *Enabling Social Europe* (Springer (2006)).
- Vroman W *Unemployment Insurance and Unemployment Assistance: A Comparison* (World Bank – Social Protection Discussion paper Series No. 0203 (2002)).
- Vukas B “The diverse supervisory procedures in a comparison” in von Maydell B and Nußberger A (eds) *Social Protection by Way of International Law: Appraisal, Deficits and Further Development* (Duncker & Humblot (1996)) 105.
- Wadhawan SK *Social Security for Workers in the Informal Sector in India* (ILO (1987)).

- Walwei U *Flexibility of Employment Relationships: Possibilities and Limits* (IAB Labour Market Research Topics no. 22 (1997)).
- Walwei U and Werner H *Employment problems in active labour market policies in industrialised countries* ISSA 26th General Assembly Marrackech, 25-31 October 1998.
- Walwei U and Werner H “Employment problems and active labor market policies in industrialized countries” in Hoskins DD *et al* (eds) *Social Security at the Dawn of the 21st Century* (Transaction (2001)) 133.
- Weber A “The supranationality problem” in Starck C (ed) *Rights, Institutions and Impact of International Law according to the German Basic Law* (Nomos (1987)) 223.
- Weiss M “Employment perspectives at the turn of the century” in *Studi Sul Lavoro: Scritti in Onore Di Gino Giugni – Tomo II* (Cacucci Editore (1999)).
- Weiss M “Fundamental Social Rights for the European Union” in Blanpain R (ed) *Labour Law and Industrial Relations in the European Union* (Kluwer (1998)) 197.
- Weiss M “Labor law” in Zekoll J and Reimann M (eds) *Introduction to German Law* (2nd ed) (Kluwer (2005)) 299.
- Weiss M “Perspectives for European law and industrial relations” in Biagi M (ed) *Towards a European Model of Industrial Relations?* (Kluwer (2001)) 97.
- Weiss M and Schmidt M “Job creation in Germany: The role of labour law, social security law and industrial relations” in Biagi M (ed) *Job Creation and Labour Law: From Protection Towards Pro-action* (Kluwer (2000)).
- Weiss M and Schmidt M *Labour Law and Industrial Relations in Germany* (Kluwer (2000)).
- Werner H and Winkler W *Unemployment Compensation Systems: A Cross-Country Comparison* (Institute for Employment Research of the Federal Employment Services Topic No. 56 (2004)).
- Würtenberger T “Equality” in Karpen U (ed) *The Constitution of the Federal Republic of Germany: Essays on the Basic Rights and Principles of the Basic Law with a Translation of the Basic Law* (Nomos (1988)) 67.
- Yemin E “Comparative survey” in Yemin E (ed) *Workforce Reductions in Undertakings* (ILO (1982)) 1.

Zacher H “The living conditions of the unemployed, their diversity and the effects of alternative welfare provision systems” in Acher M and Malinvaud E (eds) *The Future of Labour and Labour in the Future: Proceedings - Second Plenary Session of the Pontifical Academy of Social Sciences 20-23 March 1996* (Pontifical Academy of Social Sciences (1998)).

Zamagni S “The Significance of Labour in a Post-industrial Society: Unemployment and the Role of the Civil Economy” in Archer MS (ed) *Towards Reducing Unemployment: The Proceedings of the Fifth Plenary Session of the Pontifical Academy of Social Sciences 3-6 March 1999* (Pontifical Academy of Social Sciences (1999)) 89.

Zampetti PL “A new model for the role of the family in the state” in Malinvaud E (ed) *Intergenerational Solidarity* (Pontifical Academy of Social Sciences (2002)) 85.

CASES

Europe

Anna Bergemann v Bundesanstalt für Arbeit Case 236/87 European Court Reports [1988] 05125.

Angelo Campana v Bundesanstalt für Arbeit Case 375/85 European Court Reports [1987] 2387.

Bestuur der Bedrijfsvereniging voor de Metallnijverheid v L. J. Moutaen Case 39/7 European Court Reports [1976] 1901).

Bestuur van de Sociale Verzekeringsbank v J.M. Cabanis-Issarte Case C-308/93 European Court Reports [1996] I-02097.

Carl Borawitz v Landesversicherungsanstalt Westfalen (Case C-124/99 European Court Reports [2000] I-07293.

Doris Kaske v Landesgeschäftsstelle des Arbeitsmarktservice Wien Case C-277/99 European Court Reports [2002] I-01261.

Doris Knoch v Bundesanstalt für Arbeit Case C-102/91 European Court Reports [1992] I-4341.

Eckhard Kalanke v Freie Hansestadt Bremen Case C-450/93 European Court Reports [1995] I-03051.

Genaro Acciardi v Commissie Beroepszaken Administratieve Geschillen in de Provincie Noord-Holland Case C-66/92 European Court Reports [1993] I-4567.

H. Meints v Minister van Landbouw, Natuurbeheer en Visserij. Case C-57/96 European Court Reports [1997] I-6689.

Jan van Noorden v Association pour l'Emploi dans l'Industrie et le Commerce (Assedic) de l'Ardèche et de la Drôme Case C-272/90 European Court Reports [1991] I-02543.

R.J. de Laat v Bestuur van het Landelijk instituut sociale verzekeringen Case C-444/98 European Court Reports [2001] I-02229.

Salvatore Stallone v Office national de l'emploi (ONEM) Case C-212/00 European Court Reports [2001] I-7625.

The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen Case C-292/89 European Court Reports [1991] I-745.

India

Air India Statutory Corporation v United Labour Union (1997) 9 SCC 377.

Bandhua Mukti Morcha v Union of India (1984) 3 SCC 161.

Bidi Supply Co. v Union of India AIR 1956 479 (484).

Bihar Legal Support Society v Chief Justice of India (1986) 4 SCC 767.

Consumer Education and Research centre v union of India (1995) 3 SCC 42.

Delhi Development Horticulture Employees' Union v Delhi Administration (1992) 4 SCC 99.

Delhi Transport Corporation v DTC Mazdoor Congress 1991 Supp (1) SCC 600.

Dhrangadhra Chemical Works Ltd v State of Saurashtra AIR 1957 SC 264.

Edward Mills v State of Ajmer AIR 1955 SC 25.

ESI Corporation v Chanambikai Mills (1974) Lab I.C 798 (Mad).

ESI Corporation v Oswal Wollen Mills Ltd (1980) Lab I.C 1064 (Punj.).

F.N. Balsara v State of Bombay AIR 1951 SC 318.

Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) 1 SCC 608.

- Geeta v Central Bank of India, Bombay* 1978 Lab I.C 1271.
- Haroobhai v State* AIR 1967 Guj. 229.
- In J.C. Sachdev v Reserve Bank of India* (1973) II Lab L.J. 204.
- K. Rajendran v State of Tamil Nadu* (1982) 2 SCC 273.
- M.H. Hoskot v State of Maharashtra* (1978) 3 SCC 544.
- M. Hongray v Union of India* (1984) 3 SCC 82.
- Minerva Mills Ltd v Union of India* (1980) 3 SCC 625.
- Mohini Jain v State of Karnataka* (1992) 3 SCC 666.
- Nilabati Behera v State of Orissa* (1993) 2 SCC 746.
- Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545.
- Partap Singh v State of Punjab* AIR 1963 Punj. 298 (DB)).
- People's Union for democratic Rights v Union of India* (1982) 3 SCC 235.
- Railway Board v Observer Publication* AIR 1972 SC 1792.
- Ram Krishna v Justice Tendolkar* AIR 1958 SC 538.
- Rashid Ahmad v Municipal Board, Kairana* AIR 1950 SC 163.
- Rudul Sah v State of Bihar* (1983) 4 SCC 141.
- S. Mohan v P. and E.P States' Union* AIR 1954 Pepsu 136.
- Satish Chandra v Union of India* AIR 1953 SC 250.
- Sheela Barse v State of Mharashtra* (1983) 2 SCC 96.
- Showkat-un-Nissa Begunn v State of Hyderabad* AIR 1950 Hyd. 20 (FB).
- State Bank of India v Kalpaka Transport Co.* AIR 1979 Bom. 250.
- State of Madras v Champakam Dorairajan* AIR 1951 SC 226.
- State of Bihar v Gopi Kishore Prasad* AIR 1960 SC 689.
- State of Uttar Pradesh v C.S. Sharma* AIR 1968 SC 158.
- State of Uttar Pradesh v Mohammad Nooh* AIR 1958 SC 86.
- Sunil Batra v Delhi Admn.* (1978) 4 SCC 494.
- Unni Krishnan v State of A.P* (1993) 1 SCC 645.
- Yengal Venkatnasra Reddy v State* AIR 1951 Hyd. 64 (DB).
- Workmen of Meenakshi Mills Ltd v Meenakshi Mills Ltd* 1992 3 SCC 377.

South Africa

Amod v Multilateral Motor vehicle Accidents Fund (Commission for Gender Equality Intervening) 1999 (4) SA 1319 (SCA).

Atlantis Diesel Engines (Pty) Ltd v National Union of Metal Workers of South Africa (1994) 15 ILJ 1247 (A).

Baloro v University of Bophuthatswana 1995 (8) BCLR 1018 (B).

Burger v Alert Engines Parts (Pty) Ltd [1999] 1 BLLR 18 (LC).

Carlton-Shields v James North (Africa) (1990) 11 ILJ 82 (IC).

Cele v Bester Homes (Pty) Ltd (1990) 11 ILJ 516 (IC).

Commercial Catering and Allied Workers Union of SA v Status Hotel (1990) 11 ILJ 167 (IC).

Crabtree v Dono Textile Industries (1988) 9 ILJ 119 (IC).

Imperial Cold Storage & Supply Co Ltd v Field 1993 ILJ 1221 (LAC).

Government of the Republic of South Africa v Grootboom 2000 11 BCLR 1169 (CC).

Hendler & Hart (Pty) Ltd v National Union of Metalworkers of SA (1994) 15 ILJ 1285 (LAC).

Hendry v Adcock Ingram 1998 ILJ 85 (LC).

Hlongwane v Plastix (Pty) Ltd (1990) 11 ILJ 171 (IC).

Hoffmann v South African Airways 2000 (21) ILJ 2357 (CC).

Hoogenoeg Andalusite (Pty) Ltd v National Union of Mineworkers (1) (1992) 13 ILJ 87 (LAC).

J & B v Department of Home Affairs (Case no: 1906/2002).

Jacob v Prebuilt Products (Pty) Ltd (1988) 9 ILJ 1199 (IC).

Khosa v Minister of Social Development; Mahlaule v Minister of Social Development 2004 (6) BCLR 569 (CC).

Kotze v Rebel Discount Liquor Group (Pty) Ltd [2000] 2 BLLR 138 (LAC).

Langemaat v Minister of Safety and Security 1998 ILJ 240 (T).

Larbi-Ordam v Member of the Executive Council for Education (North-West Province) 1997 BCLR 1655 (CC).

Lesbian and Gay Equality Project and others v Minister of Home Affairs and others ((Case CCT 10/04 (Decided on 01 December 2005).

Lorentzen v Sanachem (Pty) Limited (1999) 20 ILJ 1811 (LC).

Mans v Mondi Kraft Ltd 2000 ILJ 213 (LC).

Martin v Beka Provident Fund (Case no: 1906/2002).

Maseko v Entitlement Experts [1997] BLLR 317 (CCMA).

Minister of Home Affairs and another v Fourie ((Case CCT 60/04) Decided on 01 December 2005).

Minister of Health v Treatment Action Campaign 2002 10 BCLR 1033.

Moropane v Gilbeys Distillers and Vintners (Pty) Ltd (1997) 10 BLLR 1320 (LC).

Muir v Mutual & Federal Pension Fund (Case no: PFA/GA/563/99).

National Union of Metalworkers of South Africa v Tek Corporation Ltd (1991) 12 ILJ 577 (LAC).

National Union of Textile Workers v Seagift Surfwear Manufacturers (1985) 6 ILJ 101 (IC).

NCGLE and others v Minister of Home Affairs and others (Case no: 3988/98).

Neuwenhuis v Group Five Roads [2000] 12 BLLR 1467 (LC).

NEWU v CCMA 2003 ILJ 2335 (LC).

Ngwenya v Alfred McAlpine (1986) 7 ILJ 442 (IC).

Ntuli v Hazelmores Group t/a Musgrave Nursing Home (Pty) Ltd (1988) 9 ILJ 709 (IC).

Park-Ross v Director, Office of Serious Economic Offences 1995 (2) SALR 148 (CC).

S v Makwanyane 1995 3 SA 391 (CC); 1995 6 BCLR 665 (CC).

SA National Defence Union v Minister of Defence 1999 ILJ 2265 (CC).

Satchwell v President of the Republic of South Africa and another 2002 (9) BCLR 986 (CC).

Schuster v CAPAB Orchestra (1992) 13 ILJ 1067 (IC).

Seedat's Executors v The Master (Natal) 1917 AD 302.

Similane v Audell Metal Products (Pty) Ltd (1987) 8 ILJ 438 (IC).

South African Clothing and Textile Workers Union v Discreto, a division of Trump and Springbok Holdings [1998] 12 BLLR 1228 (LAC).

Thomas v Carlton Centre Pharmacy (1992) 1 LCD 94 (IC).

Treatment Action Campaign v Minister of Health 2002 4 BCLR 356 (T).

Young v Lifegro Assurance (1990) 11 ILJ 1127 (IC).

Western Cape Education Department v George 1996 (17) ILJ 547 (LAC).

United Kingdom

Llyod v Brassey (1969) 1 AER 312.

INTERNATIONAL INSTRUMENTS

Abolition of Forced Labour Convention 105 of 1957.

Agreement between the Government of the Republic of South Africa and The Government of the Republic of Portugal (Regulating the employment of Portuguese workers from the Province of Mozambique) Treaty Series No. 11/1964.

Agreement between the Government of the Republic of South Africa and Malawi Treaty Series No. 10/1967.

Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Lesotho Treaty Series No. 1/1973.

Agreement between the Government of the Republic of South Africa and the Government of the Republic of Botswana Treaty Series No. 3/1973.

Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland Treaty Series No. 3/1986.

Agreement on Unemployment Insurance between the Federal Republic of Germany and Greece of 31 May 1961.

Agreement on Unemployment Insurance between the Federal Republic of Germany and Switzerland of 20 October 1982.

Agreement on Unemployment Insurance between the Federal Republic of Germany and Yugoslavia of 12 October 1968.

Apprentice Recommendation 60 of 1939.

Asbestos Convention 162 of 1986.

Asbestos Recommendation 172 of 1986.

Charter of Fundamental Rights of the European Union *Official Journal of the European Communities* C363/1, 18 December 2000.

Charter of Fundamental Social Rights of Workers of 9 December 1989.

Chemicals Convention 170 of 1990.

Chemicals Recommendations 177 of 1990.

Community Charter of Fundamental Rights of Workers of 9 December 1989.

Communications within the Undertaking Recommendation 129 of 1967.

Consultation (Industrial and national Levels) Recommendation 113 of 1960.

Contracts of Employment (Indigenous Workers) Recommendation 58 of 1939.

Convention Concerning Statistics of Wages and Hours of Work 63 of 1938.

Collective Agreements Recommendation 91 of 1951.

Collective Bargaining Convention 154 of 1981.

Collective Bargaining Recommendation 163 of 1981.

Co-operatives (Developing Countries) Recommendation 127 of 1966.

Co-operation at the Level of the Undertaking Recommendation 94 of 1952.

Council Decision of 18 February 2002 on *Guidelines for Member States' Employment Policies for the Year 2002* (2002/177/EC) – *Official Journal of the European Communities* L60/60, 1 March 2002.

Council Decision of 22 July 2003 on *Guidelines for the Employment Policies of the Member States* (2003/578/EC) – *Official Journal of the European Communities* L197/13, 5 August 2003.

Council Decision of 4 October 2004 on *Guidelines for the Employment Policies of the Member States* (2004/740/EC) – *Official Journal of the European Communities* L326/45, 29 October 2004.

Council Directive 68/360/EEC of 15 October 1968 on the *Abolition of Restrictions on Movement and Residence within the Community for Workers of Member States and their Families*.

Council Directive 75/117/EEC of 10 February 1975 on the *Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women*.

- Council Directive 79/7/EEC of 19 December 1978 on the *Progressive Implementation of the Principle of Equal Treatment for Men and Women in matters of Social Security*.
- Council Directive 92/85/EEC of 19 October 1992 on the *Introduction of Measures to Encourage Improvements in the Safety and Health at Work of pregnant Workers and Workers who have recently given Birth or are Breastfeeding (Tenth Individual Directive within the Meaning of Article 16 (1) of Directive 89/391/EEC)*.
- Council Directive 86/378/EEC of 24 July 1986 on the *Implementation of the Principle of Equal Treatment for Men and Women in Occupational Social Security Schemes*.
- Council Directive 86/613/EEC of 11 December 1986 on the *Application of the Principle of Equal Treatment between Men and Women engaged in an activity, including Agriculture, in a Self-employed capacity, and on the Protection of Self-employed Women during Pregnancy and Motherhood (the Council Directive 86/613/EEC)*.
- Council Directive 98/49/EC (of 29 June 1998) on *Safeguarding the Supplementary Pension Rights of Employed and Self-employed Persons moving within the Community*.
- Council Directive 98/59/EC of 20 July 1998 on the *Approximation of the Laws of the Member States relating to Collective Redundancies*.
- Council Directive 2000/43/EC of 29 June 2000 *Implementing the Principle of Equal Treatment between Persons*.
- Council Directive 2000/78/EC of 27 November 2000 *Establishing a General Framework for Equal Treatment in Employment and Occupation*.
- Council Directive 2001/23/EC of 12 March 2001 on the *Approximation of the Laws of the Member States Relating to the Safeguarding of Employees' Rights in the event of Transfers of Undertakings, Businesses or Parts of Undertakings or Businesses*.
- Council Regulation 574/72 (of 21 March 1972) *Laying down the Procedure for Implementing Regulation No. 1408/71/EEC on the Application of Social Security Schemes to Employed Persons, to Self-employed Person and to their Families moving within the Community*.
- Council Regulation 1408/71/EEC (of 14 June 1971) on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.

Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as regards Access to Employment, Vocational Training and Promotion, and Working Conditions.

Discrimination (Employment and Occupation) Convention 111 of 1958.

Discrimination (Employment and Occupation) Recommendation 111 of 1958.

Dock Work Convention 137 of 1973.

Dock Work Recommendation 145 of 1983.

Draft Protocol on the Free Movement of Persons in the SADC of 1995.

Elimination of Recruiting Recommendation 46 of 1936.

Employment Injury Benefits Convention 121 of 1964.

Employment Promotion and Protection against Unemployment Convention 168 of 1988.

Employment Promotion and Protection against Unemployment Recommendation 176 of 1988.

Employment Policy Convention 122 of 1964.

Employment Policy Recommendation 122 of 1964.

Employment Policy (Supplementary Provisions) Recommendation 169 of 1984.

Employment Service Convention 88 of 1948.

Employment Service Recommendation 83 of 1948.

Employment (Transition from War to Peace) Recommendation 71 of 1944.

Employment (Workers with Family Responsibilities) Recommendation 123 of 1965.

Equal Remuneration Convention 100 of 1951.

Equal Remuneration Recommendation 90 of 1951.

Equality of Treatment (Accident Compensation) Convention 19 of 1925.

Equality Treatment (Social Security) Convention 118 of 1962.

European Code of Social Security *European Treaty Series* No. 48 of 1964.

European Code of Social Security (Revised) *European Treaty Series* No. 139 of 1990.

European Convention on Social Security *European Treaty Series* No. 78 of 1972.

European Convention on Social and Medical Assistance *European Treaty Series* No. 14 of 1953.

- European Interim Agreement on Social Security Schemes relating to Old Age, Invalidity and Survivors *European Treaty Series* No. 12 of 1953.
- European Social Charter *European Treaty Series* No. 35 of 1961.
- European Social Charter (Revised) *European Treaty Series* 163 of 1996.
- Examination of Grievances Recommendation* 130 of 1967.
- Fee-Charging Employment Agencies Convention (Revised)* 96 of 1949.
- Final Articles Revision Convention* 80 of 1946.
- Final Articles Revision Convention* 116 of 1961.
- Forced Labour Convention* 29 of 1930.
- Forced Labour (Indirect Compulsion) Recommendation* 35 of 1930.
- Forced Labour (Regulation) Recommendation* 36 of 1930.
- Forty-Hour Week Convention* 47 of 1935.
- Freedom of Association and Protection of the Right to Organise Convention* 87 of 1948.
- Hygiene (Commerce and Offices) Convention* 120 of 1964.
- Hygiene (Commerce and Offices) Recommendation* 120 of 1964.
- Hours of Work (Fishing) Recommendation* 7 of 1920.
- Hours of Work (Industry) Convention* 1 of 1919.
- Holidays with Pay Convention* 52 of 1936.
- Holidays with Pay Recommendation* 47 of 1936.
- Home Work Convention* 177 of 1996.
- Home Work Recommendation* 184 of 1996.
- Human Resources Development Convention* 142 of 1975.
- Human Resources Development Recommendation* 150 of 1975.
- Income Security Recommendation* 67 of 1944.
- Job Creation in Small and Medium-Sized Enterprises Recommendation* 189 of 1998.
- Labour Administration Convention* 150 of 1978.
- Labour Administration Recommendation* 158 of 1978.
- Labour Inspection (Agriculture) Convention* 129 of 1969.
- Labour Clauses (Public Contracts) Convention* 94 of 1949.
- Labour Clauses (Public Contracts) Recommendation* 84 of 1949.
- Labour Inspection (Agriculture) Recommendation* 133 of 1969.

Labour Inspection Convention 81 of 1947.

Labour Inspection Recommendation 20 of 1923.

Labour Inspection Recommendation 81 of 1947.

Labour Inspection (Mining and Transport) Recommendation 82 of 1947.

Labour Inspectorates (Non-Metropolitan Territories) Convention 85 of 1947.

Labour Relations (Public Service) Convention 151 of 1978.

Labour Relations (Public Service) Recommendation 159 of 1978.

Labour Statistics Convention 160 of 1985.

Labour Statistics Recommendation 170 of 1985.

Maintenance of Social Security Rights Convention 157 of 1982.

Maternity Protection (Agriculture) Recommendation 12 of 1921.

Maternity Protection Convention 3 of 1919.

Maternity Protection Convention 183 of 2000.

Maternity Protection Recommendation 95 of 1952.

Maternity Protection Recommendation 191 of 2000.

Maternity Protection Convention (Revised) 103 of 1952.

Medical Care and Sickness Benefits Convention 130 of 1969.

Medical Examination (Fishermen) Convention 113 of 1959.

Medical Examination of Young Persons (Industry) Convention 77 of 1946.

Medical Examination of Young Persons (Non-Industrial Occupations) Convention 78 of 1946.

Medical Examination of Young persons (Underground Work) Convention 124 of 1965.

Migration for Employment Convention (Revised) 97 of 1949.

Migration for Employment Recommendation 61 of 1939.

Migration for Employment Recommendation (Revised) 86 of 1949.

Migrant Workers Recommendation 151 of 1975.

Migrant Workers (Supplementary Provisions) Convention 143 of 1975.

Minimum Age (Agriculture) Convention 10 of 1921.

Minimum Age Convention 138 of 1973.

Minimum Age (Industry) Convention 5 of 1919.

Minimum Age (Industry) Convention (Revised) 59 of 1937.

- Minimum Age (Fishermen) Convention* 112 of 1959.
- Minimum Age (Non-Industrial Employment) Convention* 33 of 1932.
- Minimum Age (Sea) Convention* 7 of 1920.
- Minimum Age (Sea) Convention (Revised)* 58 of 1936.
- Minimum Age (Underground Work) Convention* 123 of 1965.
- Minimum Wage Fixing Convention* 131 of 1970.
- Minimum Wage Fixing Recommendation* 135 of 1970.
- Minimum Wage-Fixing Machinery Convention* 26 of 1928.
- Minimum Wage Fixing Machinery (Agriculture) Convention* 99 of 1951.
- Minimum Wage Fixing Machinery (Agriculture) Recommendation* 89 of 1951.
- Minimum Wage-Fixing (Machinery) Recommendation* 30 of 1928.
- Night Work Convention* 171 of 1990.
- Night Work Recommendation* 178 of 1990
- Night Work (Women) Convention (Revised)* 89 of 1948.
- Night Work of Young Persons (Industry) Convention* 6 of 1919.
- Night Work of Young Persons (Industry) Convention (Revised)* 90 of 1948.
- Night Work of Young Persons (Non-Industrial Occupations) Convention* 79 of 1946.
- Nursing Personnel Recommendation* 157 of 1977.
- Occupational Cancer Convention* 139 of 1974.
- Occupational Cancer Recommendation* 147 of 1974.
- Occupational Health Services Convention* 161 of 1985.
- Occupational Safety and Health Convention* 155 of 1981.
- Occupational Safety and Health (Dock Work) Convention* 152 of 1979.
- Occupational Safety and Health (Dock Work) Recommendation* 160 of 1979.
- Occupational Safety and Health Recommendation* 164 of 1981.
- Older Workers Recommendation* 162 of 1980.
- Paid Educational Leave Convention* 140 of 1974.
- Paid Educational Leave Recommendation* 148 of 1974.
- Part-Time Work Convention* 175 of 1994.
- Part-Time Work Recommendation* 182 of 1994.
- Prevention of Industrial Accidents Recommendation* 31 of 1929.

Prevention of Major Industrial Accidents Convention 174 of 1993.

Prevention of Major Industrial Accidents Recommendation 181 of 1993.

Private Employment Agencies Convention 181 1997.

Private Employment Agencies Recommendation 188 of 1997.

Promotion of Cooperatives Recommendation 193 of 2002.

Protection of Migrant Workers (Underdeveloped Countries) Recommendation 100 of 1955.

Protection of Wages Convention 95 of 1949.

Protection of Wages Recommendation 85 of 1949.

Protection of Workers' Claims (Employer's Insolvency) Convention 173 of 1992.

Protection of Worker's Claims (Employer's Insolvency) Recommendation 180 of 1992.

Protection of Workers' Health Recommendation 97 of 1953.

Protocol of 1995 to the Labour Inspection 81 of 1947.

Protocol to the European Code of Social Security European Treaty Series No. 48 of 1964.

Radiation Protection Convention 115 of 1960.

Radiation Protection Recommendation 114 of 1960.

Reciprocity of Treatment Recommendation 2 of 1919.

Regulation (EEC) 1408/71 of the Council of 14 June 1971 on the Application of Social Security Schemes to Employed Persons and their Families moving within the Community.

Regulation 883/2004/EC of the European Parliament and the Council (of 29 April 2004) on the Coordination of Social Security Systems.

Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on Freedom of Movement for Workers within the Community.

Right of Association (Agriculture) Convention 11 of 1921.

Right of Association (Non-Metropolitan Territories) Convention 84 of 1947.

Right to Organise and Collective Bargaining Convention 98 of 1949.

Rural Workers' Organisations Convention 141 of 1975.

Rural Workers' Organisations Recommendation 149 of 1975.

Safety and Health in Agriculture Convention 184 of 2001.

- Safety and Health in Construction Convention* 167 of 1988.
- Safety and Health in Mines Convention* 176 of 1995.
- Safety and Health in Mines Recommendation* 183 of 1995.
- Seafarers' Social Security (Agreement) Recommendation* 75 of 1946.
- Seafarers' Welfare Convention* 163 of 1987.
- Seafarers' Welfare Recommendation* 173 of 1987.
- Seafarers' Social Welfare Recommendation* 138 of 1970.
- (Shelved) Contracts of Employment (Indigenous Workers) Convention* 64 of 1939.
- (Shelved) Contracts of Employment (Indigenous Workers) Convention* 86 of 1947.
- (Shelved) Fee-Charging Employment Agencies Convention* 34 of 1933.
- (Shelved) Night Work (Women) Convention* 4 of 1919.
- (Shelved) Minimum Age (Trimmers and Stokers) Convention* 15 of 1921.
- (Shelved) Minimum Age (Non-Industrial Employment) Convention (Revised)* 60 of 1937.
- (Shelved) Recruiting of Indigenous Workers Convention* 50 of 1936.
- (Shelved) Unemployment Provision Convention* 44 of 1934.
- Sickness Insurance (Agriculture) Convention* 25 of 1927.
- Sickness Insurance (Industry) Convention* 24 of 1927.
- Sickness Insurance Recommendation* 29 of 1927.
- Sickness Insurance (Sea) Convention* 56 of 1936.
- Social Security (Minimum Standards) Convention* 102 of 1952.
- Social Security (Seafarers) Convention (Revised)* 165 of 1987.
- Social Policy (Basic Aims and Standards) Convention* 117 of 1962.
- Social Policy in Dependent Territories (Supplementary Provisions) Recommendation* 74 of 1945.
- Social Policy in Dependent Territories Recommendation* 70 of 1944.
- Social Policy (Non-Metropolitan Territories) Convention* 82 of 1947.
- Southern African Development Community Treaty* – accessed at <http://www.sadc.int>.
- Special Youth Schemes Recommendation* 136 of 1970.
- Statute of the Council of Europe European Treaty Series* No. 1 of 1949.
- Termination of Employment Convention* 158 of 1982.
- Termination of Employment Recommendation* 119 of 1963.

Termination of Employment Recommendation 166 of 1982.

Treaty on European Community (Consolidated Version) *Official Journal of the European Communities* C325/33, 24 December 2002 – accessed at http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/pdf/12002E_EN.pdf.

Treaty on European Union (Consolidated Version) *Official Journal of the European Communities* C325/5, 24 December 2002 – accessed at http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002M/pdf/12002M_EN.pdf.

Tripartite Consultation (Activities of the International Labour Organisation) Recommendation 152 of 1976.

Tripartite Consultation (International Standards) Convention 144 of 1976.

Unemployment Convention 2 of 1919.

Unemployment Indemnity (Shipwreck) Convention 8 of 1920.

Unemployment Insurance (Seamen) Recommendation 10 of 1920.

Unemployment Provision Recommendation 44 of 1934.

Vocational Guidance Recommendation 87 of 1949.

Vocational Rehabilitation (Disabled) Recommendation 99 of 1955.

Vocational Rehabilitation and Employment (Disabled Persons) Convention 159 of 1983.

Vocational Rehabilitation and Employment (Disabled Persons) Recommendation 168 of 1983.

Vocational Training (Adult) Recommendation 88 of 1950.

Vocational Training (Agriculture) Recommendation 101 of 1956.

Vocational Training (Fishermen) Recommendation 126 of 1966.

Vocational Training Recommendation 57 of 1939.

Vocational Training Recommendation 117 of 1962.

Voluntary Conciliation and Arbitration Recommendation 92 of 1952.

Weekly Rest (Industry) Convention 14 of 1921.

Welfare Facilities Recommendation 112 of 1959.

Worst Forms of Child Labour Convention 182 of 1999.

Workers' Housing Recommendation 115 of 1961.

Workers' Representatives Convention 135 of 1971.

Workers' Representatives Recommendation 143 of 1971.

Workers with Family Responsibilities Convention 156 of 1981.

Workers with Family Responsibilities Recommendation 165 of 1981.

Working Environment (Air Pollution, Noise and Vibration) Convention 148 of 1977.

Working Environment (Air Pollution, Noise and Vibration) Recommendation 156 of 1977.

Workmen's Compensation (Agriculture) Convention 12 of 1921.

Workmen's Compensation (Accidents) Convention 17 of 1925.

Workmen's Compensation (Occupational Diseases) Convention 18 of 1925.

Workmen's Compensation (Occupational Diseases) Convention (Revised) 42 of 1934.

Workmen's Compensation (Occupational Diseases) Recommendation 24 of 1925.

REPORTS AND OTHER DOCUMENTS

Adato M and Haddad L Targeting Poverty Through Community-Based Public Works Programs: A Cross-Disciplinary Assessment of Recent Experience in South Africa (IFPRI Discussion Paper 121) – accessed at <http://www.ifpri.org>.

Ahmadi AM “Keynote: At the inaugural function of the Golden Jubilee Celebrations of the Constitution” (1997) 2 Supreme Court Cases (Journal) 18 – accessed at <http://www.ebc-india.com/lawyer/articles/97v2a4.htm>.

Anand AS “Justice N.D. Krishna Rao Memorial Lecture Protection of Human Rights – Judicial obligation or judicial activism” (1997) 7 Supreme Court Cases (Journal) 11 – accessed at <http://www.ebc-india.com/lawyer/articles/97v7a2.htm>.

Anand AS “M.C Bhandari Memorial Lecture – Public interest litigation as aid to protection of human rights” (2001) 7 Supreme Court Cases (Journal) 1 – accessed at <http://www.ebc-india.com/lawyer/articles/2001v7a1.htm>.

Appelbaum E “Transformation of work and employment and new insecurities” Paper presented at a Conference on the Future of Work, Employment and Social Protection, Annecy, 18-19 January 2001.

Apt NA “Ageing in Africa” Paper prepared for World Congress on Medicine and Health, Hanover, 21 July-31 August 2000 – accessed at <http://www.mh-hannover.de>.

- Apt NA “Ageing in Africa: Revisiting traditional safety nets” – accessed at http://www.geocities.com/csps_Ghana/ageing/safety.html.
- Apt NA “Rapid urbanisation and living arrangements of older persons” – accessed at http://www.un.org/esa/population/publication/bulletin42_43/apt.pdf.
- Asian Development Bank “Social protection: Reducing risks, increasing opportunities” – accessed at <http://www.adb.org/SocialProtection/default.asp>.
- Babadji R “Legal foundations for the rights to education” – accessed at <http://www.eip-cifedhop.org/english/publications/dossiersperda.html#1>.
- Barrientos A and Lloyd-Sherlock P “Non-contributory pensions and social protection” (NCPPS (2002)) – accessed at <http://idpm.man.ac.uk/ncpps>.
- Bernstein A and Dagut S “Get cracking on labour-intensive projects” (Article extracted from “Sowetan” 23 April 2003) – accessed at <http://www.fnf.org/News/CDE-Article.htm>.
- Béteille A *Caste, Inequality and Affirmative Action* (ILO International Instituted for Labour Studies (2002)) – accessed at <http://www.ilo.org/public/english/bureau/inst/download/andre.pdf>.
- Bhorat H “A universal income grant scheme for South Africa: An empirical assessment” Paper presented at the 9th International Congress of the Basic Income European Network, Geneva, 12-14 September 2002.
- Central Intelligence Agency *The World Fact Book: Germany* – accessed at <http://www.cia.gov/cia/publications/factbook/geos/gm.html#Econ>.
- Cohen D “Poverty and HIV/AIDS in Sub-Saharan Africa” SEPED Conference Paper Series 7 – accessed at http://www.undp.org/publications/conf_pub.htm.
- “Commission Communication: Proposal for guidelines for Member States employment policies 1998” – accessed at <http://europa.eu.int>.
- Commission of the European Communities *Communication from the Commission: Free Movement of Workers – Achieving the Full Benefits and Potential* COM (2002) 694 final – accessed at http://europa.eu.int/eur-lex/en/com/cnc/2002/com2002_0694en01.pdf.

- Committee of Inquiry into a Comprehensive System of Social Security for South Africa
Transforming the Present Protecting the Future (Report of the Committee of Enquiry into a Comprehensive System of Social Security for South Africa (2002)).
- Committee of Enquiry into a Comprehensive Social Security System for South Africa
Committee Report No 5: Social Protection: Employment and Unemployment (Committee of Enquiry into a Comprehensive Social Security System for South Africa (2002)) 166 – accessed at <http://www.saprn.org.za>.
- Committee of Experts on the Application on Conventions and Recommendations
Equality of Treatment (Social Security) Convention, 1962 (No. 118): India Observation, Committee of Experts on the Application on Conventions and Recommendations (CEACR) 2001/72nd Session.
- Committee on the Rights of a Child “Concluding observations on the rights of the child: South Africa” 28/01/2000.CRC/C/15.Add.122. (Concluding Observations/Comments).
- Committee of Inquiry into a Comprehensive System of Social Security for South Africa
“Committee Report no: 8 – Poverty, social assistance and the Basic Income Grant” 298 – accessed at <http://www.sarpn.org.za>.
- Complaint against the Government of Swaziland presented by the International Confederation of Free Trade Unions (ICFTU) Report No. 306, Case(s) No(s). 1884.
- Complaint against the Government of Swaziland presented by the International Confederation of Free Trade Unions (ICFTU) Report No. 310, Case(s) No(s). 1884.
- Complaint against the Government of Swaziland presented by the Swaziland Federation of Trade Unions (SFTU) Report No. 321, Case(s) No(s). 2019, Complaint against the Government of Swaziland presented by the Swaziland Federation of Trade Unions (SFTU) Report No. 328, Case(s) No(s). 2143.
- Complaint against the Government of Zimbabwe presented by the International Confederation of Free Trade Unions (ICFTU) Report No. 307, Cases(s) No(s). 1909.
- Complaint against the Government of Zimbabwe presented by the International Federation of commercial, Clerical, Professional and Technical Employees (FIET) Report No. 309, Case(s) No(s) 1937.

Complaint against the Government of Zimbabwe presented by the Zimbabwe Congress of Trade Unions (ZCTU) Report No. 320, Case(s). 2027.

Complaint against the Government of Zimbabwe presented by the Zimbabwe Congress of Trade Unions (ZCTU) Report No. 323, Case(s). 2081.

Council of Europe “About the Council of Europe” – accessed at http://www.coe.int/T/e/Com/about_coe/.

Council of Europe “Council of Europe and European Union” – accessed at <http://www.coe.int>.

Council of Europe (Secretariat) “European Social Charter (1996) / Revised Charter (1996) and supervisory machinery” – accessed at <http://www.coe.int>.

Council of Europe “The Council of Europe’s Member States” – accessed at http://www.coe.int/T/e/com/about_coe/members_states/default.asp.

Council of Europe *Work of the Council of Europe in the Social Security Field* (Council of Europe (2002)) – accessed at <http://www.coe.int>.

Crush J “Contract migration to South Africa: Past, present and future” – <http://www.queensu.ca/samp/transform/Crush.htm>.

Crush and Williams J (eds) *Thinking about Brain Drain in Southern Africa* (SAMP Migration Policy Brief No. 8) – accessed at <http://www.queensu.ca/samp/publications/policybriefs/brief8.pdf>.

Declaration Concerning the Policy of "Apartheid" of the Republic of South Africa – Adopted unanimously (by acclamation) by the International Labour Conference on July 8, 1964 – accessed at <http://www.anc.org.za/un/ilo-declaration.html>.

Department of Labour *Annual Report of the Unemployment Insurance Fund for the Period 1 April 2003 to 31 March 2004* (Department of Labour (2004)).

Department of Labour Sectoral Determination 5: Learnerships – accessed at http://www.labour.gov.za/legislation/sectoral_display.jsp?id=5411.

Department of Land Affairs *White Paper on South African Land Policy* (1997) – accessed at http://www.polity.org.za/govdocs/white_papers/landwp.html.

Department of Public Works “The Community Based Public Works Programme” – accessed at <http://www.publicworks.gov.za>.

- Department of Public Works “The Construction Industry Development Programme” – accessed at <http://www.publicworks.gov.za>.
- Department of Water Affairs and Forestry “Working for Water Programme” – accessed at <http://www.dwaf.gov.za>.
- Department of Water Affairs and Forestry “Working for Water: Secondary industries” – accessed at <http://www.dwaf.gov.za/wfw/SecondaryInd>.
- Dercon S “Safety nets, savings and informal social security systems in crisis-prone economies” Paper presented at the Annual Bank Conference on Development Economics in Europe, Paris, 21-23 June 1999.
- Dikotla M and Verhoef G “The development of trade in SADCC: The first decade of trade in the new regional formation, 1980-1989” Paper presented at the International Economic History Congress, Buenos Aires, 23 July 2002 – accessed at <http://www.eh.net/XVIICongress/Papers/Dikotla.pdf>.
- Dhavse R “India together: Entitling 40 million rural workers – September 2004” – accessed at <http://www.indiatogether.org>.
- Ebsen I “Unemployment protection from a comparative perspective” Paper presented at a Conference on the Integration of Labour and Social Security Law in the SADC-Region, Frankfurt/Main, Germany, 29-30 June, 2005.
- Egger P and Sengenberger W “Decent work issues and policies” – accessed at <http://www.ilo.org/public/English/bureau/dwpp/papers/dwpolicy.htm>.
- Endresen S and Jauch H “Export Processing Zones (EPZs): A success story?” (International Labour Resource and Information Group) – accessed at <http://www.larri.com.na>.
- European Union “European Union institutions and other bodies” – accessed at http://europa.eu.int/institutions/index_en.htm.
- European Union (Employment and Social Affairs) “Coordination of social security schemes” – accessed at <http://europa.eu.int>.
- “Explanatory Report on the European Convention on Social Security” – accessed at <http://conventions.coe.int/Treaty/en/Reports/Html/078.htm>.
- Extended Public Works Programme *Creating Opportunities Towards Human Fulfilment: Second 2004/05 Quarterly Report* – <http://www.epwp.gov.za/reprot/2q04.htm>.

Extended Public Works Programme “Creating opportunities towards human fulfilment” – <http://www.epwp.gov.za/index.htm>.

Extended Public Works Programme “Economic sector” – <http://www.epwp.gov.za>.

Extended Public Works Programme “Environmental sector” – <http://www.epwp.gov.za>.

Extended Public Works Programme “Infrastructure sector” – accessed at <http://www.epwp.gov.za>.

Fredman S “Equality: A new generation? – Developments in the European context” Paper presented at the Conference on Equality – Theory and Practice in South Africa and Elsewhere, University of Cape Town, 18-20 January 2001.

Gabotlale B “SADC may not meet Millennium Development Goals” (2004) 21 *Mmegi* – accessed at <http://www.mmegi.bw/2004/December/Friday3/10330434111768.html>.

Gazier B “Labour markets and transitions: Introductory text” Paper presented at a Symposium on the Future of Work, Employment and Social Protection: The Dynamics of Change and the Protection of Workers, Lyon, 17-18 January 2002.

Gokul R “Equality and gender in African customary law in South Africa” Paper presented at the Conference on Equality – Theory and Practice in South Africa and Elsewhere, University of Cape Town, 18-20 January 2001.

Govindjee A “South Africa’s expanded public works programme in comparison with employment creation mechanisms in India’s five year plans” Paper presented at the CROP and CICLASS Law and Poverty VI Workshop, Johannesburg, South Africa, 26-28 January 2005.

Graham-Brown S “Social protection in South Africa” (2002) *NCPPS Newsletter* 3 – accessed at <http://idpm.man.ac.uk/ncpps>.

Gsänger H “Linking informal and formal social security systems” Deutsche Stiftung für Internationale Entwicklung – accessed at <http://www.dse.de/ef/social/gsaenger.htm>.

“Harambee – Pulling together the African style” – accessed at <http://kabiza.com>.

“Hartz IV violates the German constitution” – http://www.sahrawagenknecht.de/en/html/hartz_iv_violates_the_german_c.php.

Hénaire J “The right to education: Setting the context” – accessed at <http://www.eip-cifedhop.org/english/publications/dossiersperda.html#1>.

- Holzmann R *et al* “Severance pay programs around the world: Rationale, status, and reforms” Paper prepared for the joint World Bank/International Institute for Applied System Analysis/Ludwig Boltzmann Institute for Economic Analysis Workshop on Severance Payments, IISASA/Laxenburg, 7-8 November 2003.
- ILO “Ad hoc supervisory mechanisms – International labour standards” – accessed at <http://www.ilo.org>.
- ILO “Explanation of the regular system of supervision” – accessed at <http://www.ilo.org>.
- ILO “Fact-Finding and Conciliation Commission on Freedom of Association” – accessed at <http://www.ilo.org/public/english/standards/norm/enforced/foa/ffcc.htm>.
- ILO “Handbook of procedures relating to international labour Conventions and Recommendations” – accessed at <http://www.ilo.org>.
- ILO “ILOLEX: Database of international standards” – accessed at <http://www.ilo.org>.
- ILO “International labour standards by subject” – accessed at <http://www.ilo.org>.
- ILO *Termination of Employment Digest* – accessed at <http://www.ilo.org/public/english/dialogue/ifpdial/downloads/term/digest.pdf>.
- ILOLEX “2004, Promoting employment: Chapter V – Involvement of the social partners in the design and implementation of policies” – accessed at <http://www.ilo.org>.
- ILOLEX “1995, Protection against unjustified dismissal: Terminations of employment for economic, technological, structural or similar reasons” – accessed at <http://www.ilo.org>.
- International Confederation of Free Trade Unions “Mauritius: Annual survey of violations of trade union right” (International Confederation of Free Trade Unions (2004)) – accessed at <http://www.icftu.org>.
- International Confederation of Free Trade Unions “South Africa: Annual survey of violations of trade union right” (International Confederation of Free Trade Unions (2003)) – accessed at <http://www.icftu.org>.
- International Confederation of Free Trade Unions “Swaziland: Annual survey of violations of trade union right” (International Confederation of Free Trade Unions (2004)) – accessed at <http://www.icftu.org>.

- International Confederation of Free Trade Unions “Zimbabwe: Annual survey of violations of trade union right” (International Confederation of Free Trade Unions (2003)) – accessed at <http://www.icftu.org>.
- “Immediate action programme to bring down youth unemployment: Programme for training, qualification and employment of young people” – accessed <http://www.bma.de/gb/arbeitsmarkt/100000jobs.htm>.
- Iyer SV “Social security in India: Some issues and options” *Critical Reflections on State Human Development Reports* (GOA, 12-14 December 2003) – accessed at <http://goa.undp.org.in/resources/GOA%20DR.IYER2003.pdf>.
- Jain S “Contract of service and contract for service” (2003) 8 *Supreme Court Cases (Journal)* 2 – <http://www.ebc-india.com/lawyer/articles/2003v8a2.htm>.
- Jagannath SV “The state of rights in contemporary India” – accessed at http://www.columbia.edu/cu/ipsg/eld/eld_sjagan.html.
- Jansen van Rensburg L “A rights-based approach to the alleviation of poverty at local government level” – accessed at <http://www.kas.org.za>.
- Jaswal PS “Public accountability for violation of human rights and judicial activism in India: Some observation” (2002) 3 *Supreme Court Cases (Journal)* 6 – <http://www.ebc-india.com/lawyer/articles/2002v3a2.htm>.
- Javillier J-C “The impact of international social security standards” Conference on the ISSA Initiative, Vancouver, Canada, 10-12 September 2002.
- Kirov D “South Africa’s skilled labour shortage – myth or reality” – accessed at <http://www.sba.muohio.edu/abas/2000/kirovda.pdf>.
- Klausen S “The uncertain future of white supremacy and the politics of fertility in South Africa – 1930-1939” – accessed at <http://wiserweb.wits.ac.za/PDF%20Files/international%20-%20klausen.PDF>.
- Kolm A and Larsen B “Social norm, the informal sector and unemployment” - accessed at <http://www.cbs.dk/departments/econ/res/wpeco42002.pdf>.
- Lahiff E *Land, Water and Local Government in South Africa: A Case of the Mutale River Valley* (IDPM Rural Resources/Rural Livelihoods Working Paper No. 7 (1997)) – accessed at http://idpm.man.ac.uk/publications/wp/rr/rr_wp07.shtml.

- Lebert T “An introduction to land and agrarian reform in Zimbabwe” – accessed at <http://www.nlc.co.za/pubs2003/anintroto.pdf>.
- “Less welfare, more public works” *Mail & Guardian* 5 August 2003 – accessed at <http://archive.mg.co.za>.
- Liebenberg S and O’Sullivan M “South Africa’s new equality legislation: A tool for advancing women’s socio-economic equality? Paper presented at the Conference on Equality – Theory and Practice in South Africa and Elsewhere, University of Cape Town, 18-20 January 2001.
- Loenen T “Towards a common standard of achievement?: Developments in international equality law” Paper presented at the Conference on Equality – Theory and Practice in South Africa and Elsewhere, University of Cape Town, 18-20 January 2001.
- Low-cost housing probe” *Dispatch Online* (15 May 2002) – accessed at <http://www.dispatch.co.za/2002/05/15/southafrica/CFRAUD.HTM>.
- Lund F and Patel Z “Socio-economic context of health” (1995) *South African Health Review* – accessed at <http://www.hst.org.za/sahr/chap2.htm>.
- Mandela N “Inauguration speech” 10 May 1994 (Union Buildings, Pretoria (South Africa)).
- Mallagee F and Nyman R “Developmental welfare: Who benefits and who bears the costs? – accessed at <http://www.idasa.org.za>.
- Matisson HM and Seeking J “Welfare in wonderland?: The politics of the Basic Income Grant in South Africa” Paper prepared for the Political Studies Seminar, University of Cape Town, 27 August 2002.
- Mbaya S “Land reform in Zimbabwe: Lessons and prospects from a poverty alleviation perspective” Paper presented at the Conference on Land Reform and Poverty Alleviation in Southern Africa, Pretoria, South Africa, 4-5 June 2001 – accessed at <http://www.sarpn.org.za/EventPapers/Land/20010604Mbaya.pdf>.
- McCord A “An overview of the performance and potential of Public Works Programme in South Africa” Paper prepared for the DPRU/Tips Forum, 8-10 September 2003, Johannesburg.
- McCord A “Public works and overcoming under-development in South Africa” Paper presented at the Conference on Overcoming Under-development in South Africa’s

Second Economy, Pretoria, South Africa, 28-29 October 2004 – accessed at www.polity.org.za/pdf/PublicWorks.pdf.

McDonald S “The impact of the proposed Basic Income Grant on the Western Cape” A paper prepared for the 6th Annual Conference on Global Economic Analysis, The Hague, Netherlands, 12-14 June 2003.

Mehta AK and Shah A *Chronic Poverty in India: Overview Study* (Chronic Poverty Research Centre Working Paper No. 7) – accessed at <http://www.chronicpoverty.org/pdfs/india.pdf>.

Meth C “Widening the net: Incorporating domestic workers into the social security system” (2001) 4 *NALEDI Policy Bulletin* – accessed at <http://www.naledi.org.za>.

Mhone GCZ “Enclavity and Constrained Labour Absorptive Capacity in Southern African Economies” Draft paper prepared for the discussion at the UNRISD meeting on “The Need to Rethink Development Economics”, 7-8 September 2001, Cape Town, South Africa.

Minattur J “The unenforceable directives in the Indian Constitution” (1975) 1 *Supreme Court Cases (Journal)* 17 – accessed at <http://www.ebc-india.com/lawyer/articles/2003v5a4.htm>.

Ministry of Labour India *The Ministry of Labour Annual Report 2001-2002* (Government of India) – accessed at <http://www.labour.nic.in/annrep/annrep2001-02.htm>.

Mmegi “Water remains SADC priority in 2004” (2004) 21 *Mmegi* – accessed at <http://www.mmegi.bw/2004/January/Wednesday21/7407918841220.html>.

Mokgoro JY “Ubuntu and the law in South Africa” Paper presented at the first Colloquium on Constitution and Law, Potchefstroom, South Africa, 31 October 1997.

Mokopanele T “More than 600 000 domestic employers on UIF” *Mail & Guardian Online* 2 June 2004 – accessed at <http://www.mg.co.za>.

Mulenga LC “Youth unemployment in Africa: Policy responses, outcomes and issues in the context of globalisation” Paper presented to the Dialogue on Youth Employment, Harvard Centre for International Development, Cambridge, MA, USA, 14-15 September 1999.

- Mutual Information System on Social Protection of the Council of Europe (MISSCEO) *A Reader's Guide to the MISSCEO Comparative Tables of Social Protection Systems* (Council of Europe) – accessed at <http://www.coe.int>.
- Myburgh A “Globalisation, labour mobility and the economics of emigration: The case of South Africa” TIPS 2002 Annual Forum, Muldersdrift – accessed at <http://www.queeensu.ca/samp/migdocs/Documents/2002/TIPS.pdf>.
- Naidoo R and Jarvis D “Skills development not a panacea” – accessed at <http://www.naledi.org.za>.
- Naidoo R “The Basic Income Grant: Poverty, politics and policy-making” Paper presented at the Harold Wolpe Lecture Series, University of Natal, 31 October 2002.
- Nanavaty R “From local to global and informal to formal”: Entering mainstream markets” Paper presented at the EGDI and UNU-WIDER Conference Unlocking Human Potential: Linking the Formal and Informal Sectors, Helsinki, Finland, 17-18 September 2004.
- National Commission to Review the Working of the Constitution (of India) *Report of the National Commission to Review the Working of the Constitution* – accessed at <http://lawmin.nic.in/ncrwc/finalreport.htm>.
- National Labour and Economic Development (NALEDI) *Highlights of Current Labor Market Conditions in South Africa* (Global Policy Network (2004)) – accessed at <http://www.globalpolicynetwork.org>.
- Naudé W and Jansen van Rensburg L “Understanding poverty as a human rights violation: The case of legal reform and local economic development in South Africa” Paper presented at the Conference on Economic Growth and Poverty in Africa, Oxford, 18-19 March 2002.
- Nott J and Yates S “A challenge to invisibility: Intergenerational experiences of ageing in the urban context” Paper presented at the Urban Policy Group DSA Conference University of Bath, September 1999.
- Ntsebeza L “Land tenure reform in South Africa: An example from the Eastern Cape Province” – accessed at http://www.iiied.org/docs/drylands/dry_ip82.pdf.
- Olivier MP and Guthrie R “Extending employment injury and disease protection to the non-formal sector and non-citizen workers: The quest for innovative approaches”

Paper presented at the 7th International Conference on Work Injuries Prevention, Rehabilitation and Compensation, Hong Kong, 27-29 June 2006.

Olivier MP and Mpedi LG “Extending social security to families in the African context: The complementary role of formal and informal social security” Paper presented at the 4th International Research Conference on Social Security, Antwerp, 5-7 May 2003 – accessed at <http://www.issa.int/pdf/anvers03/topic2/2olivier.pdf>.

Olivier MP *et al* “Formulating an integrated social security response: Perspectives on developing links between informal and formal social security in the SADC region” Paper presented at the EGDI and UNU-WIDER Conference Unlocking Human Potential: Linking the Informal and Formal Sectors, Helsinki, Finland, 17-18 September 2004.

Otting A “International co-ordination of unemployment insurance” in a Conference Bundle for a Social Security Training Course on the Study of Co-ordinating Instruments in the Social Security Field, Hotel Palace, Sinaia, Romania, 25-28 March 2004 – accessed at <http://www.coe.int>.

Palkhivala NA “The fundamental rights case: Propositions submitted before Supreme Court” (1973) 4 *Supreme Court Cases (Journal)* 1 – accessed at <http://www.ebc-india.com/lawyer/articles/73v4a1.htm>.

Parenzee P “A gendered look at the Poverty Relief Funds” – accessed at <http://www.idasa.org.za/bis/docs/budgetBrief129.htm>.

Pigeon C “Reforms in the coordination of social security systems for people who within the European Union” Paper presented at the International Social Security Association European Regional Meeting on Migrants and Social Protection, Oslo, 21-23 April 2004.

Pressly D “State to cut jobs” – accessed at <http://www.sundaytimes.co.za>.

“Public works’ million-job target” – accessed at http://www.southafrica.info/ess_info/sa_glance/social_delivery/publicworks.htm.

Rao MN “Judicial activism” (1997) 8 *Supreme Court Cases (Journal)* 1 – accessed at <http://www.ebc-india.com/lawyer/articles/97v8a1.htm>.

Rao PM “Social security for the unorganised sector in India – An approach paper” – accessed at <http://www.eldis.org/fulltext/raosocial.pdf>.

- Rao PP “Basic features of the Constitution” (2000) 2 *Supreme Court Cases (Journal)* 1 – accessed at <http://www.ebc-india.com/lawyer/articles/2000v2a1.htm>.
- Roskam A “An exploratory look into labour market regulation” (Unpublished Paper).
- SADC *Employment and Labour Sector (ELS) Annual Progress Report 2001-2002* – accessed at <http://www.sadc.int>.
- SADC *Regional Indicative Strategic Development Plan (RISDP)* – accessed at <http://www.sadc.int>.
- SADC *Southern African Development Community Annual Report 2002-2003* – accessed at <http://www.sadc.int>.
- Samson M *et al Research Review on Social Security Reform and the Basic Income Grant for South Africa* (Economic Policy Research Institute (2002)) – accessed at <http://www.epri.org.za/rp31.pdf>.
- Sathe SP “Judicial enforcement of socio-economic and cultural rights” Paper prepared for the First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 1-3 November 2002.
- Schoeman M “From SADCC to SADC and beyond: The politics of economic integration” Paper presented at the International Economic History Congress, Buenos Aires, 23 July 2002 – accessed at <http://www.eh.net/XVIICongress/Papers/Schoeman.pdf>.
- “Self-employment policies: Review on the bridging benefits for promoting self-employment in Germany and measures and measures to promote self-employment of unemployed person in Italy” – accessed at <http://peereview.almp.org/pdf/en991oex.pdf>.
- Singh A “Affirmative action programme: A comparative study of India and US” – accessed at <http://sos-net.eu.org/red&s/dhdi/recherches/etudesdiverses/memoires/amarthesis.pdf>.
- Singh J “The law, labour and development in India” Paper presented at the Annual Bank Conference on development Economics – Europe, 24-26 June 2002, Oslo.
- Singh MP “Are articles 15 (4) and 16 (4) fundamental rights?” (1994) 3 *Supreme Court Cases (Journal)* 33 – <http://www.ebc-india.com/lawyer/articles/94v3a2.htm>.

- Singh MP “The statics and the dynamics of the fundamental rights and the directives principles – A human rights perspective” (2003) 2 *Supreme Court Cases (Journal)* 1 – accessed at <http://www.ebc-india.com/lawyer/articles/2003v5a4.htm>.
- Skewiya Z “Statement on the poverty relief programme” – accessed at <http://www.gcis.gov.za/media/cabinet/000329mwelf.htm>.
- South African Law Commission *Islamic Marriages and Related Matters: Report (Project 59)* (South African Law Commission (2003)) – accessed at <http://www.law.wits.ac.za/salc/salc.html>.
- South African Revenue Services *Unemployment Insurance Contributions: Guideline to Employers* (South African Revenue Services (2002)) – accessed at http://www.sars.gov.za/uif/guidelines/uif_brochure.pdf.
- “South Africa’s racist legacy of colonisation and land dispossession” – accessed at <http://www.nlc.co.za/pamphlets/lr3.htm>.
- Speech by Minister of Education, Kader Asmal at the launch of the South African National Literary Initiative, Midrand, Gauteng (26 June 2000) – accessed at http://education.pwv.gov.za/Media/Speeches_2000/June_2000/Sanli_Launch.htm.
- Special Allocation for Poverty Relief Infrastructure Investment and Jobs Summit Projects: An overview” – accessed at <http://www.projectliteracy.org.za/tmpl/Documents/Julia%20de%20Bruyn.doc>.
- Subbarao K *Public Works as an Anti-poverty Program: An Overview of Cross-country Experience* (World Bank (1997)) – accessed at <http://www.worldbank.org/poverty/safety/pworks/pworks.pdf>.
- Subrahmanya RKA “Adapting social security schemes to the challenges of a long life society: The Indian experience” Paper presented at the 4th International Research Conference on Social Security, Antwerp, 5-7 May 2003.
- Sunday Times “UIF is R1.44m in the Black” (28 August 2003) – accessed at <http://www.sundaytimes.co.za/zones/sundaytimes/business/business1062064327.asp>.
- Swartz L “Poverty, population dynamics and unemployment in South Africa, with reference to the four major racial groups” Paper presented at the Joint Population Conference, University of Pretoria, 2-4 October 2001.

Tabane R and Hafajee F “Less welfare, more jobs” – accessed at <http://allafrica.com/stories/20030807096.html>.

The Employment Bureau of Africa (TEBA) Agreement of Service (entered into between the Employee and TEBA acting on behalf of the Employer) – accessed at <http://www.queensu.ca/samp/Treaties/TEBA.htm>.

The Reconstruction and Development Programme: A Policy Framework (1994) – accessed at <http://www.polity.org.za/html/govdocs/rdp/rdp.html>.

The Unorganised Sector Workers’ Social Security Scheme – <http://www.labour.nic.in/ss/socialsecurityunorganised.pdf>.

“The Working for Water Programme takes a stand against HIV/Aids in South Africa” – accessed at <http://www.dwaf.gov.za>.

The 1998 Employment Guidelines Council Resolution of 15 December 1997 – accessed at <http://europa.eu.int>.

Van der Berg S “Education, poverty and inequality in South Africa” Paper presented at the Conference on Economic Growth and Poverty in Africa, Oxford, 18-19 March 2002.

Van der Berg S “The Basic Income Grant: Comments on the report of the Committee of Inquiry into a Comprehensive Social Security System” – accessed at http://www.safoundation.org.za/documents/THE_BASIC_INCOME_GRANT.doc.

Van der Berg S “The role of education in labour market earnings, poverty and inequality” Paper presented at the DPRU/FES Conference on Labour Markets and Poverty in South Africa, Johannesburg, 15-16 November 2001.

Van Ginnekin W “The global campaign on social security and coverage for all” Paper presented at the International Conference on Globalization and the Welfare State? World Society, Transnational Social Policy and New Welfare States in Transitional Countries, Delmenhorst, Germany, 8-10 February 2004.

Van Niekerk A “Regulating flexibility and small business: Revisiting the LRA and the BCEA – A Response to Halton Cheadle’s draft concept paper” (Unpublished Paper (2006)).

Von Benda-Beckmann F and Kirsch R “Informal security systems in Southern Africa and approaches to strengthen them through public policy measures” – accessed at <http://www.gtz.de>.

We care...do you?: The Working for Water Programme commemorate World HIV/Aids Day” – accessed at <http://www.dwaf.gov.za>.

“Working for water meets the challenge of HIV/Aids in Mpumalanga” – accessed at <http://www.dwaf.gov.za/wfw/Docs/Aids/HIV.doc>.

World Bank *Botswana – Selected Development Impact of HIV/AIDS* (Report No. 22043-BT (2001)).

World Bank *Education – Education Sector Strategy* (International Bank for Reconstruction and Development/World Bank (1999)) – accessed at http://www.logos-net.net/ilo/150_base/en/publ/pdf_06.htm.

World Bank *Namibia – Selected Development Impact of HIV/AIDS* (Report No. 22046-Nam (2001)).

World Bank *Lesotho – The Developmental Impact of HIV/AIDS: Selected Issues and Options* (Report No. 21103-LSO (2000)).

World Bank *Swaziland – Selected Development Impact of HIV/AIDS* (Report No. 22044-SW (2000)).

World Bank “The poor rely on informal networks and local institutions to survive, including the local holy man and the local nurse” – accessed at <http://www.worldbank.org>.

WordIQ – accessed at <http://www.wordiq.com/definition/Bantustan.html>

Zuma J “Address at the launch of the Extended Public Works Programme” Nombika High School, Durban, 28 August 2004 – accessed at <http://www.anc.org.za/ancdocs/history/zuma/2004jz0828.html>.

STATUTES

Botswana

Employment Act of 1982.

Trade Disputes Act 15 of 2004.

Germany

Benefits and Leave for Care of Children Act (Bundeserziehungsgeldgesetz) of 6 December 1985.

Civil Code (Bürgerliches Gesetzbuch).

Constitution of the Federal Republic of Germany (Grundgesetz) 23 May 1949.

Insurance Regulation or the Farmers Health Insurance Act (Gesetzes über die Krankenversicherung der Landwirte) of 1989.

Job Protection on Call-up to Perform Military Service Act (Arbeitsplatzschutzgesetz) of 30 March 1957.

Maternity Protection Act (Mutterschutzgesetz) of 24 January 1952.

Payment of Wages during Sickness Act (Entgeltfortzahlungsgesetz) of 26 May 1994.

Protection against Dismissal Act (Kündigungsschutzgesetz) of 10 August 1951.

Social Code (Sozialgesetzbuch).

Social Insurance Regulation (Reichversicherungsordnung) of 19 July 1911.

Works Constitution Act (Betriebsverfassungsgesetz) of 15 January 1972.

India

Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act (1996).

Building and Other Construction Workers Welfare Cess Act (1966).

Cine Workers Welfare Cess Act (1981).

Constitution of India of 26 November 1949.

Employee State Insurance Act (1948).

Employees' State Insurance (Central) Rules (1950).

Industrial Disputes Act (1947).

Industrial Disputes (Central) Rules (1957).

Industrial Employment (Standing Orders) Act (1946).

Industrial Employment (Standing Orders) Central Rules (1946).

Iron Ore, Manganese Ore and Chrome Ore Mines Labour Welfare Cess Act (1976).

Limestone and Mines Labour Welfare Fund Act (1972).

Maternity Benefits Act (1961).

Mica Mines Labour Fund Act (1946).

Payment of Gratuity Act (1972).

Payment of Wages Act (1936).

Personal Injuries (Compensation Insurance) Act (1963).

Plantation Labour Act (1951).

Welfare Workers Welfare Cess Act (1976).

Workmen's Compensation Act (1923).

Malawi

Employment Act 6 of 2000.

Namibia

Labour Act of 1992.

Lesotho

Labour Code of 1992.

South Africa

Architectural Profession Act 44 of 2000.

Basic Conditions of Employment Act 75 of 1997.

Code of Good Practice for Special Public Works Programme No. R64 of 2002 (Gazette 23045).

Constitution of the Republic of South Africa 108 of 1996.

- Construction Industry Development Board Act* 38 of 2000.
- Council for the Built Environment Act* 43 of 2000.
- Employment Equity Act* 55 of 1998.
- Engineering Profession Act* 46 of 2000.
- Guidance and Placement Act* 62 of 1981.
- Guidelines for the Implementation of Labour Intensive Infrastructure Projects under the Expanded Public Works Programme Notice* 554 of 2004 (Gazette No. 26180).
- Labour Market and Human Resource Development for Job Creation: Social Plan Notice* 1590 of 1999 (Government Gazette Vol. 409, 20305, 23 July 1999).
- Labour Relations Act* 66 of 1995.
- Landscape Architectural Profession Act* 45 of 2000.
- Local Government Training Act* 41 of 1985.
- Manpower Training Act* 56 of 1981.
- Project and Construction Management Professions Act* 48 of 2000.
- Property Valuers Act* 47 of 2000.
- Protected Disclosures Act* 26 of 2000.
- Quantity Surveying Profession Act* of 2000.
- Restitution of Land Rights Act* 22 of 1994.
- Sectoral Determination 11: Taxi Sector* 2005.
- South African Schools Act* 84 of 1996.
- Skills Development Act* 97 of 1998.
- Skills Development Levies Act* 9 of 1999.
- Social Assistance Act* 13 of 2004.
- Telecommunications Act* 106 of 1996.
- Unemployment Insurance Act* 30 of 1966.
- Unemployment Insurance Act* 63 of 2001.
- Unemployment Insurance Contributions Act* 4 of 2002.
- Unemployment Insurance Amendment Bill* 35 of 2003.
- Wage Determination 452 for the Road Transportation Trade in Certain Areas* of July 1988.

Sweden

Employment Protection Act (SFS 1982: 80)).

Tanzania

Employment and Labour Relations Act 6 of 2004.